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Supreme Court, U.S.
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CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

HENRY J. KAISER COMPANY,
STANDARD OIL COMPANY OF CALIFORNIA,
CHEVRON CHEMICAL COMPANY
and EUGENE GREEN,
Petitioners,

VS.

DONALD PAIGE and ANDREW HARRIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 20, 1987

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QUESTIONS PRESENTED

1. Does Section 301 of the Labor-Management Relations Act, because of the paramount federal policy of resolving workplace disputes through arbitration, pre-empt state tort claims for wrongful discharge and unsafe working conditions by employees who fail to exhaust the grievance and arbitration procedures made applicable to such disputes by the provisions of their collective-bargaining agreement?[1]

2. Did the Ninth Circuit err in holding that employees allegedly terminated for engaging in activities arguably protected by the National Labor Relations Act may, as masters of their complaint, avoid *Garmon* pre-emption simply by casting their claims as state-law torts?

* Rule 28.1 List is included in the appendix hereto, p. A-21, *infra*.

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[1] On October 13, 1987, certiorari was granted on a question included within the question presented here. In *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, ____ U.S. ____, 108 S.Ct. 226, the question accepted was:

> Does section 301 of the Labor-Management Relations Act pre-empt states from protecting employees against being discharged for seeking benefits under the state's workers compensation program, simply because the employee is a member of a union that has negotiated a grievance and arbitration procedure for resolving disputes with the employer about the collective bargaining agreement?

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Petitioners,

vs.

DONALD PAIGE and ANDREW HARRIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 27, 1987.

PARTIES

The only parties to the proceeding below are those noted on the caption to this petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 826 F.2d 857, and is reprinted in the appendix hereto, p. A-1, *infra*. The order of the United States

District Court for the Northern District of California (Vukasin, D.J.) has not been reported. It is reprinted in the appendix hereto, p. A-16, *infra*.

SUPREME COURT JURISDICTION

The judgment of the court of appeals was issued on August 27, 1987. No petition for rehearing has been filed. The court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Respondents Donald Paige and Andrew Harris were employed by Petitioner Henry J. Kaiser Company ("Kaiser") as welding machine tenders on a construction project in Richmond, California. Hundreds of workers, represented by dozens of unions, were employed on the project to help construct a Chevron coal liquefaction plant. A collective-bargaining agreement between Kaiser and Operating Engineers Local 3 governed the terms and conditions of respondents' employment. The collective-bargaining agreement prohibited discipline or discharge of the workers except for good cause; it also required the parties to comply with all state and federal safety laws and regulations. The agreement mandated that all disputes at the worksite be resolved by a three-step grievance procedure culminating in final and binding arbitration.

As welding machine tenders, respondents' job duties included filling generator tanks of the welding machines located throughout the construction site. Believing the refueling procedures and the conditions under which they were to perform their duties to be unsafe, Paige and Harris complained to the project supervisor. When their demanded changes were not made, respondents on July 26, 1982 refused to continue work until the problems were corrected to their satisfaction. Paige and Harris then were terminated by the project supervisor for their refusal to fuel the generators.

In accordance with the terms of the Kaiser-Operating Engineers Local 3 collective-bargaining agreement, respondents submitted their safety dispute and their discharges to the grievance procedure. The grievances were denied at the first step, and respondents failed to pursue the disputes to the second step of the process.

Almost one year later, on June 24, 1983, Paige and Harris filed a complaint in a California state court. The complaint alleged seven causes of action—all arising from their work at or discharge from the job site:

(1) wrongful discharge in violation of an alleged California public policy of employment saftey;

(2) wrongful discharge in breach of a covenant of good faith and fair dealing implied from the collective-bargaining agreement;

(3) intentional infliction of emotional distress resulting from having to perform unsafe work and from petitioners' failure to improve the unsafe working conditions;

(4) negligent infliction of emotional distress resulting from having to perform unsafe work and from petitioners' failure to improve unsafe working conditions;

(5) assault, based on petitioners' having required respondents to perform work in an unsafe employment setting and on failing to improve the working conditions;

(6) "peculiar risk," based on petitioners' knowing of a safety risk and failing to take "special precautions" to improve the working conditions; and

(7) "ultrahazardous activity," based on petitioners' having required respondents to perform ultrahazardous tasks.

Petitioners removed the case to federal court on the basis of federal question jurisdiction, 28 U.S.C. §§ 1331 and 1441, asserting that the purported state claims were artfully-pleaded federal claims for breach of a collective-bargaining agreement under § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185.

After hearing cross-motions by the petitioners and respondents, the district court agreed that respondents' claims for wrongful discharge in violation of California public policy and for breach of an implied covenant of good faith dealing arising from the collective-bargaining agreement were artfully-pleaded § 301 claims and were barred by the applicable 100-day statute of limitations. App. A-16. The court concluded that any California interest in workplace safety did not override the "strong federal policy favoring a uniform labor dispute resolution process." A-18.

Although all the wrongs complained of by respondents in the five pre-termination, "working conditions" claims also involved the conduct of Kaiser in not providing safer working conditions and were equally subject to the contract grievance procedures, the district court characterized them as "pendent" to the artfully-pleaded claims arising under § 301 and remanded them to the state court. A-19.

Respondents appealed the judgment dismissing the § 301 claims, and petitioners brought a petition for a writ of mandamus requiring the district court to retain jurisdiction over the five working conditions claims and to dismiss them on pre-emption grounds. Petitioners argued in opposition of the appeal that the district court correctly dismissed the wrongful discharge claims because they were intertwined with the provisions of the collective-bargaining agreement and therefore were pre-empted by § 301 and the "strong federal policy favoring a uniform dispute resolution process." See A-18. Petitioners also argued that the actions by Paige and Harris protesting workplace safety and refusing to perform their duties arguably were protected concerted activities under *NLRB v. City Disposal Systems*, 465 U.S.

822 (1984), and therefore also were pre-empted by the *Garmon* rule extending primary jurisdiction to the National Labor Relations Board over disputes involving concerted activities protected by the National Labor Relations Act. In their mandamus petition, petitioners argued that, because the court had jurisdiction over the lawsuit, and because the tortious conduct alleged in the five "working conditions" tort claims arose out of the same grievable workplace safety dispute, the remanded claims also were subject to the labor agreement's mandatory and final grievance and arbitration procedures, and therefore were preempted by § 301.

On appeal, the Ninth Circuit affirmed the district court's dismissal of the state claim for wrongful discharge in breach of an implied covenant of good faith and fair dealing, observing that, because the implied covenant claim was alleged to arise from the collective-bargaining agreement, the claim necessarily arose under § 301 and could not be independently maintained under state law. A-6, -7. The court further held that, because federal removal jurisdiction existed over this claim, jurisdiction existed over the remaining claims as well. Having held that the district court had properly assumed jurisdiction, the court of appeals affirmed the court's dismissal of the implied covenant claim as time-barred. A-7.

The Ninth Circuit disagreed, however, with the district court's conclusion that the public policy wrongful discharge claim was pre-empted. The retaliatory discharge claim alleged violations of various sections of the California Labor Code providing for regulation of employment safety matters.[1] Despite the collective-bargaining agreement's explicit requirement that the parties comply with all state and federal health and safety laws, despite the

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[1] California Occupational Safety and Health Act ("Cal/OSHA"), Cal.Lab.Code §§ 6310, 6311, 6400, 6401, 6403, and 6404. The statute provide a make-whole remedy for a worker discharged in retaliation for complaining of safety matters. Cal.Lab.Code § 6310. Moreover, any employer refusing to reinstate a complaining employee "who has been determined to be eligible for such rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law" is guilty of a misdemeanor. Cal.Lab.Code § 6310.

agreement's provisions allowing termination only for just cause, and despite its mandatory grievance/arbitration procedures for resolving all workplace and contract disputes, the Ninth Circuit held that the claim was not pre-empted, reversed the district court's dismissal of the claim, and remanded it to state court for trial, reasoning only that the claim was based solely on state law and therefore required no interpretation of or reference to the collective-bargaining agreement. The court ignored the fact that the dispute also was covered by the terms of the collective-bargaining agreement and subject to its mandatory grievance and arbitration procedures, and did not even discuss the paramount federal interest under § 301 of resolving workplace disputes through arbitration and of enforcing agreements to do so.

Thus, by allowing respondents to maintain their state tort claim for wrongful discharge in violation of public policy, the Ninth Circuit implicitly elevated state concerns about workplace safety over the federal interest in enforcing collective-bargaining agreements.

The court of appeals also declined to decide whether respondents' concerted activity in protesting safety conditions and refusing to work represented arguably protected conduct under the National Labor Relations Act. Without explanation or consideration of the holdings contained in this Court's decisions in *Garmon* or *City Disposal Systems*, the court concluded that respondents were free to circumvent the National Labor Relations Board's primary jurisdiction over such matters simply by basing their discharge cause of action on state law rather than on the NLRA.

Finally, the court of appeals ignored petitioners' contention that the five "working conditions" tort claims remanded by the district court were disputes intertwined with the grievance and arbitration procedures of the collective-bargaining agreement. Instead, the court again asserted that, because the claims involved workplace safety and therefore implicated state safety interests, the district court had correctly held that they were not pre-empted and properly had remanded them to the state court.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF SEVERAL CIRCUITS AND THIS COURT IN APPLYING § 301 TO STATE TORT CLAIMS COVERED BY THE GRIEVANCE AND ARBITRATION PROVISIONS OF A COLLECTIVE-BARGAINING AGREEMENT

Irreconcilable decisions and inconsistent approaches have characterized attempts by the lower courts to resolve the conflict between the federal labor policy favoring arbitration of workplace disputes and application of general state laws to unionized workers. The Seventh, Eighth, Fourth and, at times, the Ninth Circuits have recognized that state claims whose outcome depends on analysis of a collective-bargaining agreement's just cause and grievance/arbitration provisions are pre-empted by § 301.[2] Other circuits, including the Second, Third, and Tenth, have allowed union employees claiming unjust dismissal to bypass their arbitration remedy and sue their employers in state courts.[3] The Ninth Circuit has produced conflicting decisions whose outcomes, as in the instant case, appear to hinge more on the creativity of plaintiffs in framing their complaint and their state policy arguments than on any consistent legal principle.[4]

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[2] *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 226; *Johnson v. Hussmann Corp.*, 805 F.2d 795 (8th Cir. 1986); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987) (state law invasion of privacy claim held preempted by section 301 because propriety of search and subsequent discharge could have been grieved under collective bargaining agreement).

[3] *Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987); *Herring v. Prince Macaroni*, 799 F.2d 120, 124 n.2 (3d Cir. 1986); *Peabody Galion v. A.V. Dollar*, 666 F.2d 1309 (10th Cir. 1981).

[4] *Compare Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984) (no pre-emption) with *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984) (preemption) and *DeSoto v. Yellow Freight Systems*, 811 F.2d 1333 (9th Cir. 1987) (preemption).

These conflicts undoubtedly motivated that Court to accept certiorari of the Seventh Circuit's decision in *Lingle*, a decision whose outcome conflicts with the Ninth Circuit's holding that Paige and Harris could sidestep the dispute resolution mechanism of their collective-bargaining agreement and sue petitioners in state court for retaliatory discharge. The same question is presented here, but this case is a more far-reaching vehicle for analysis of federal pre-emption law.

The changing legal landscape of at-will employment has heightened the tension between state and federal law as unionized employees increasingly have sought to circumvent their labor agreements and the grievance/arbitration process to take advantage of general tort remedies arguably applicable to the same conduct. The *Lingle* case presents one narrow aspect of this conflict: whether a unionized worker can sue his employer for retaliatory discharge in violation of a state workers compensation act. A similar court-made wrongful discharge action is at issue here, as well as a battery of state law torts arising out of the employer's conduct in a dispute over working conditions that led to the employees' discharge. These include claims for intentional and negligent infliction of emotional distress—claims that commonly accompany state wrongful discharge litigation.

The conflict among the circuits, coupled with the ever-increasing flood of lawsuits asserting wrongful termination, intentional infliction of emotional distress and similar employment-related tort claims, amplifies the need for this Court's guidance on the spectrum of discharge-related torts that inevitably become entangled with the grievance and arbitration provisions of a collective-bargaining agreement. The multiple claims in this case therefore provide a more satisfactory vehicle for the Court to provide such guidance than does the limited, single cause of action in *Lingle*.[5]

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[5] Petitioners respectfully request the Court to grant certiorari in this case and to set the case for hearing at the same time as *Lingle*. The issues raised in both matters could be considered together and decided in a single opinion. Alternatively, petitioners request the Court to grant certiorari and to hold the instant case in abeyance pending its decision in *Lingle*. At that time, the Court could determine whether additional

II

THE DECISION BELOW IGNORES FEDERAL POLICY UNDER § 301 PRECLUDING THE CIRCUMVENTION OF ENFORCEABLE GRIEVANCE AND ARBITRATION PROCEDURES AND RAISES AN IMPORTANT QUESTION OF LAW THIS COURT SHOULD RESOLVE

Review also is compelled by the Ninth Circuit's imposition of a "balancing" test that completely ignores the "central role of arbitration in our system of industrial self-government." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 219 (1985), quoting *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581 (1960).[6]

For 30 years, this Court has recognized that § 301 confers jurisdiction on the federal courts to compel arbitration and to preclude individual employees from circumventing the grievance and arbitration procedures of a collective-bargaining agreement. *See Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456-57 (1957). The decisions of this Court recognize that, where parties exercise their federal right to agree to be bound by a collective-bargaining agreement, a "rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness." *Allis-Chalmers,* 471 U.S. at 219.

The court below, however, merely analyzed the nature and scope of state public policy apart from the collective-bargaining agreement and its binding grievance/arbitration provisions. Not surprisingly, an analysis of *any* complaint alleging state tort claims could readily yield the Ninth Circuit's conclusion that the "source" of the asserted claims is state statutory or common law, not the collective-bargaining agreement. *See Franchise Tax*

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proceedings were required on this case or whether it could simply remand the matter for further consideration in light of the decision in *Lingle.*

[6] Under § 301 pre-emption analysis, "the balancing of–state and federal interest required by *Garmon* pre-emption is irrelevant, since Congress, acting within its power under the Commerce Clause, has provided that federal law must prevail." *Allis-Chalmers,* 471 U.S. at 213, n.9.

Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal, 463 U.S. 1, 23 (1983).[7] By improperly balancing state and federal policy, however, the Ninth Circuit failed to consider that, where a collective-bargaining agreement provides a final, binding and exclusive arbitral remedy, overlapping or "incompatible doctrines of local law must give way to principles of federal labor law." *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 102 (1962).

Although "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301," *Allis-Chalmers,* 471 U.S. at 211, claims "substantially dependent on analysis of a collective-bargaining agreement" may not evade the pre-emptive force of § 301 by being cast as state-law claims. *Id.* at 220; *see also, International Brotherhood of Electrical Workers v. Hechler,* U.S. , 107 S.Ct. 2161, 95 L.Ed 2d 791, 801, n.3 (1987).

The conduct complained of by Paige and Harris was not merely tangential to the labor agreement at issue. That agreement calls for final and binding resolution, under the mandatory grievance and arbitration provisions, of "all disputes"—a phrase that includes violations of the employer's contractual and legal obligation to maintain safe working conditions *and* includes claims that a discharge arising out of a safety dispute was wrongful and therefore without just cause.[8] This fact prompted respondents to

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[7] The Court stated in *Franchise Tax* that the "Court of Appeals held, [in *Arco.*,] and we affirmed, . . . that the petitioner's action 'arose under' § 301 and thus could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law." 463 U.S. at 24.

[8] In *Lingle,* the Seventh Circuit squarely rejected the argument accepted by the Ninth Circuit here: that where the source of a retaliatory discharge claim is state law, resolution does not require an interpretation of a collective-bargaining agreement. 823 F.2d at 1046. Describing such reasoning as "inverted," the court stated:

> [T]he just cause provision in the collective-bargaining agreement may well prohibit such retaliatory discharge. It is the scope of

submit grievances of their discharge and of the claimed unsafe working conditions to the first step under the labor contract's dispute resolution procedure. Respondents' own actions thereby reflect that their disputes were grievances that could be remedied under the collective-bargaining agreement.[9]

In permitting respondents to evade arbitration by recharacterizing their disputes over working conditions and their discharge as state law torts, the Ninth Circuit has ignored the principal concern of this Court's decision in *Allis-Chalmers:*

> Perhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement. The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour.* [citation omitted] The parties here agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract. Unless this suit is pre-empted, their federal right to decide who is to resolve contract disputes will be lost.

471 U.S. at 219.

Regardless of the names attached to each of respondents' state tort claims, they all involve disputes about termination or working

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> the contract that must be analyzed initially. To conclude otherwise, by analyzing the state tort first, would allow the states, through the guise of the worker's compensation laws, to circumvent the arbitration and grievance procedures envisioned by Congress as exclusive.

Lingle, 823 F.2d at 1046. (citations omitted).

The Seventh Circuit therefore concluded that where "a plaintiff makes a claim for wrongful discharge, this claim necessarily implicates a just cause provision," noting that in such a case, a "state court would be deciding precisely the same issue as would an arbitrator: whether there was 'just cause' to discharge the worker." *Id.* at 1046, 1049.

[9] In *Gateway Coal Co. v. Mine Workers* 414 U.S. 368 (1974), the union struck over an employer's decision to reinstate foremen facing criminal charges for falsifying safety records. The court ruled that the safety issue was arbitrable under the parties' labor agreement.

conditions—disputes inextricably intertwined with and subject to the grievance and arbitration provisions of the collective-bargaining agreement. The Ninth Circuit has permitted them to bypass arbitration for a lawsuit in state court. The result is emasculation of the arbitration process, "a central tenet of federal labor-contract law under § 301." *Allis-Chalmers,* 471 U.S. at 220.

Preservation of industrial self-government and the integrity and effectiveness of arbitration are fundamental to this Court's analysis of § 301 pre-emption, concerns not even discussed and apparently deemed irrelevant by the Ninth Circuit in this case. If the Ninth Circuit's approach is commonly adopted in the federal courts, labor arbitration will lose its effectiveness, and an important federal interest will be significantly impaired. These harmful consequences reflect the critical need for this court to review the Ninth Circuit's decision and to affirm the paramount federal interest in enforcement of arbitration clauses in collective-bargaining agreements.

III

THE DECISION OF THE COURT OF APPEALS EVADES THIS COURT'S *GARMON* DECISION AND THREATENS THE INTEGRITY OF THE UNIFORM ENFORCEMENT SCHEME DESIGNED TO PROTECT NATIONAL LABOR POLICY

Preserving uniformity in national labor policy by deferring to a single tribunal also lies at the core of pre-emption analysis under *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). Because the conduct at issue arguably represents protected concerted activity in protest of working conditions deemed unsafe by Paige and Harris, this case also raises an equally important federal question under *Garmon.* States are prohibited from regulating activities arguably protected or prohibited by the National Labor Relations Act ("NLRA") because Congress empowered the National Labor Relations Board ("NLRB") with

exclusive jurisdiction to shape the underlying federal regulatory scheme.[10]

The Ninth Circuit below rejected application of the *Garmon* rule principally on the ground that Paige and Harris were "masters of their complaint" who, "[b]y foregoing their claim based on federal law, . . . may choose to plead their action as a state claim." A-8, citing *Caterpillar v. Williams*, ____ U.S. ____, 107 S.Ct. 2425, 2431, 96 L.Ed. 2d 318 (1987). On this basis, the court below concluded that "*Garmon* analysis is therefore not relevant to this case." *Id.*

But the Ninth Circuit's "analysis" begs the pre-emption question. The aspect of the court's decision in *Caterpillar* cited by the court of appeals involved the removability of state claims in the face of a federal pre-emption defense. Here, however, the Ninth Circuit correctly held that it *had* removal jurisdiction based on the implied covenant claim arising from the collective-bargaining agreement. A-7. Once a court has jurisdiction, it must address a federal pre-emption defense under *Garmon* on the *merits*. *International Longshoremen's Association v. Davis*, 476 U.S. 380 (1986).

Consequently, the court's analysis dodged the crux of *Garmon*:

> In the absence of the Board's clear determination that an activity is neither prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction . . . . The governing consideration is that to allow the State to control activities that are potentially subject to federal regulation involves a great danger of conflict with national labor policy.

359 U.S. at 246.

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[10] Claims arising under § 301 also may involve arguably protected or prohibited conduct under the NLRA. However, the *Garmon* pre-emption doctrine does not deprive the court of jurisdiction to uphold arbitration as the proper forum for resolution of a suit deemed to arise under § 301. *See Smith v. Evening News Association*, 371 U.S. 195 (1962) and *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).

The protest engaged in by Paige and Harris—complaining about workplace safety and refusing to perform a job claimed to be unsafe—coupled with Kaiser's alleged termination of their employment because of this activity, makes this case one clearly falling within the NLRB's exclusive jurisdiction.[11] In *NLRB v. City Disposal System, Inc.*, 465 U.S. 822 (1984), this Court held that an individual driver who refused to drive a truck he believed was unsafe was engaged in protected concerted activity, where the collective-bargaining agreement provided that the employer could not require employees to drive unsafe vehicles. Likewise, the collective-bargaining agreement between Kaiser and respondents' union required the parties to comply with all federal and state health and safety laws, including OSHA, on the construction project. Coupled with the just cause provision of the labor agreement, Kaiser therefore could not terminate workers for refusing to violate safety laws or protesting unsafe working conditions. Under *City Disposal*, a safety protest by even an individual worker is "concerted" activity where the dispute involves a right contained in the collective-bargaining agreement, a conclusion that brings the joint protest by Paige and Kaiser well within the ambit of arguably protected concerted activity.[12]

By allowing Paige and Harris to seek state tort remedies withheld from the NLRB, the court below has "accentuate[d] the danger of conflict" because "remedies form an ingredient of any integrated scheme of regulation." *Garmon*, 359 U.S. at 247.

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[11] *See, e.g., Union Boiler Co.* 213 NLRB No. 113, *enforced*, 530 F.2d 970 (4th Cir. 1975) (refusal by four union employees to perform work claimed unsafe held protected concerted activity even though other union employees did not refuse); *Wray Elec. Contracting, Inc.*, 210 NLRB No. 110 (1974) (filing of OSHA complaint by individual held protected concerted activity).

[12] Even if respondents' conduct could possibly be characterized as not involving a right contained in the collective-bargaining agreement, the protest by two union workers of safety conditions affecting all construction workers constitutes arguably protected concerted activity. See *Meyers Industries, Inc.*, 268 NLRB No. 493 (1984), *rev'd sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 971 (1985), 281 NLRB No. 118 (1986).

The reasoning behind the *Garmon* rule—that state regulation is preempted when the conduct sought to be regulated is at least arguably protected or prohibited by the LMRA—has "its greatest force when applied to state laws regulating the relations between employees, their union, and their employer." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 193 (1978). The Ninth Circuit's decision to ground a supplemental wrongful discharge tort remedy on a state workplace safety policy aggravates the potential conflict between state regulation and the integrity of the federal scheme: the laws of California and the NLRA are "brought to bear on precisely the same conduct." *Sears*, 436 U.S. at 193-94.

The Ninth Circuit's decision glibly dismisses the applicability of *Garmon* and fails to address the touchstone of *Garmon* preemption analysis: the *potential* for state law intrusion into territory Congress deemed to be within the exclusive realm of the NLRB. If the danger of state interference with national labor policy is to be averted, that question, according to the Court, is for the Board not the state of federal courts, to decide.

CONCLUSION

The conflicting decisions of several circuits in resolving the choice of upholding the paramount federal policy under § 301 of resolving workplace disputes through arbitration or of allowing unionized workers to maintain overlapping and duplicative state tort claims magnifies the need for a dispositive decision from this Court. This case includes not only the same issue that will be presented to the Court in *Lingle*, but also presents the range of tort claims intertwined with labor contract provisions that commonly accompany wrongful discharge claims. By failing to recognize, or even to address, the federal policy favoring arbitration under § 301, and by giving a plaintiff unfettered discretion to avert *Garmon* pre-emption simply by his pleading claim on state law, the Ninth Circuit's decision underscores the need for clear resolution by the Court of all of these issues. Petitioners therefore pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: November 20, 1987

Respectfully submitted,

GILMORE F. DIEKMANN, JR.
(Counsel of Record)
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BRONSON, BRONSON & MCKINNON

By _____
Attorneys for Petitioners

Appendix A

For Publication

United States Court of Appeals
for the Ninth Circuit

No. 84-2246
D.C. No.
CV 83-4202 JPV

Donald Paige and Andrew Harris,
Plaintiffs-Appellants,

v.

Henry J. Kaiser Company,
Standard Oil Company of California,
Chevron Chemical Company,
Eugene Green, and Does 1-20 inclusive,
Defendants-Appellees.

No. 84-7866
D.C. No.
CV 83-4204 JPV

Henry J. Kaiser Company,
Standard Oil Company of California,
Chevron Chemical Company,
Petitioners,

v.

United States District Court
for the Northern District of California,
Respondent,

and

Donald Paige and Andrew Harris,
Real Parties in Interest.

OPINION

Argued and Submitted September 11, 1985—
San Francisco, California

Filed August 27, 1987

Before: Herbert Y. C. Choy, Procter Hug, Jr. and
Mary M. Schroeder, Circuit Judges.

Opinion by Judge Hug

Appeal from the United States District Court
for the Northern District of California
J.P. Vukasin, Jr., District Judge, Presiding

OPINION

HUG, Circuit Judge:

Appellants brought this action in a California state court alleging that they had been required by their employer to fill generators with gasoline under unsafe conditions despite their protests, and that when they refused to do so, they were fired. The complaint alleged seven causes of action. The case was removed to federal court on the ground that the claims asserted were artfully pleaded federal claims.

I.

Two claims for wrongful discharge based on state law were held to be completely preempted by section 301 of the Labor Management Relations Act ("LMRA") and thus were held to have been properly removed and barred by the statute of limitations. The principal issue on appeal is whether the determination of complete preemption of either or both of the wrongful discharge claims was proper.

Paige and Harris's complaint also contained five other claims. The district court remanded these claims to state court after dismissing the wrongful discharge claims. The appellees brought a petition for a writ of mandamus or prohibition to require the district court to retain jurisdiction of these remaining causes of action. This petition has been consolidated with the appeal of the judgment.

The first issue on this consolidated appeal is whether either or both of the state wrongful discharge claims were completely preempted and barred by the statute of limitations. The second issue concerns the question raised in the petition for mandamus, which is whether the district court properly remanded the state causes of action to the state court.

II.

The facts as alleged by appellants Donald Paige and Andrew Harris are as follows: They worked for defendant Henry J. Kaiser

Company ("Kaiser") on construction of a coal liquefaction plant for defendant Chevron Chemical Company. Appellants were employed by Kaiser as welding machine tenders pursuant to a collective bargaining agreement between Kaiser and Operating Engineers Local 3.

Appellants' duties included filling generator gas tanks. Appellants spent two to three hours each day fueling the 12 gasoline generators on the construction site. Several circumstances caused plaintiffs to believe that this work was unnecessarily and illegally hazardous: the filling was done before the engines had cooled; funnels were broken, causing leakage during pouring; the containers for carrying the fuel to the generators were in poor condition causing spillage; and much of the refueling was required to be done beneath falling sparks given off by welders.

Appellants spoke with responsible parties over an 11-day period in an attempt to correct this situation; however, no changes were ever made. On July 26, 1982, in response to the company's inaction, appellants refused to refuel a generator when so requested. Appellants were then fired by Kaiser superintendent Gene Green. The next day, Gene Green and representatives of Local 3 met and discussed the firings. After the meeting, the Local 3 representatives told appellants there was nothing that could be done. Appellants then filed their state court action.

Appellants' state court complaint contained seven tort causes of action under California law; (1) the appellants were wrongfully discharged in violation of the sections of the California Labor Code that provide for the regulation of occupational safety and health;[1] (2) the appellants were wrongfully discharged in violation of an implied covenant of good faith and fair dealing; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) assault; (6) Chevron and Standard, who employed Kaiser as an independent contractor and knew or should have recognized the peculiar risk of harm, willfully, maliciously, and oppressively refused to take precautions

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[1] California Occupational Safety and Health Act ("Cal/OSHA"), Cal. Lab. Code §§ 6310, 6311, 6400, 6401, 6403, and 6404 (West. Supp. 1987).

resulting in economic damage and justifying punitive damages; and (7) appellees willfully, maliciously, and oppressively required appellants to perform ultrahazardous tasks to their economic damage and justifying punitive damages.

The appellees removed the action on the ground that the wrongful discharge claims were, in actuality, claims under section 301 of the LMRA, 29 U.S.C. § 185(a) (1982), which had been artfully pled as state law claims. The appellees then filed a motion for summary judgment on the ground that the section 301 claims were barred by the statute of limitations.

In response to the appellants' motion to remand and Kaiser's motion for summary judgment, the district court found, after applying the artful pleading doctrine, that the two wrongful discharge claims were, in fact, claims under section 301 of the LMRA, and were therefore subject to removal. Having assumed jurisdiction, the court dismissed the two section 301 claims because they were barred by the applicable statute of limitations.[2] After dismissing the recharacterized state claims, the district court declined to exercise pendent jurisdiction over the remaining state law claims and remanded them to the state court.

III.

The Supreme Court succinctly outlined the requirements for removal jurisdiction based on preemption in the recent case of *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2429 (1987):

> Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *See Gully v. First National Bank*, 299 U.S. 109, 112-113 (1936). The rule

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[2] Appellants agree that if these claims are, in fact, artfully pled section 301 actions, the are time-barred.

> makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

(Footnotes omitted.) Under *Gully*, federal jurisdiction can be sustained only if a right created by federal law is an essential element of the claim. 299 U.S. at 112. Under this well-pleaded complaint rule, however, the federal question must appear from the complaint itself and not from any defense that might be raised. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983). Although the plaintiff is master of his own pleadings, he may not avoid federal jurisdiction by omitting from the complaint allegations of federal law that are essential to the establishment of his claim. A complaint that does so has been characterized as an "artfully-pleaded" complaint, as opposed to a "well-pleaded complaint" that does specifically refer to the essential federal law. The courts recharacterize the "artfully-pleaded" complaint as though it had been "well-pleaded." *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1471-72 (9th Cir. 1984); *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1370 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985).

In this case, the district court held that federal jurisdiction existed because the two wrongful discharge actions, although artfully pleaded as state torts, were, in fact, claims for breach of the collective bargaining agreement between Kaiser and Local 3, and thus were preempted by section 301 of the LMRA.[3] In determining whether the federal law preempts the state law, the essential inquiry is the intent of Congress in enacting the federal statute. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985). Preemption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its

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[3] Section 301 of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In enacting section 301 of the LMRA, Congress did not state explicitly whether and to what extent it intended to preempt state law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). Without express preemption, a state law will not be displaced unless it conflicts with federal law or would frustrate the federal scheme, or unless it is apparent from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states. *Id.* at 209.

The preemptive force of section 301 is so powerful as to displace entirely any state cause of action for violation of a collective bargaining agreement. *Franchise Tax Bd.*, 463 U.S. at 23. In such a case, the action may be removed to federal court even if an otherwise adequate state cause of action may exist. *Id.* at 23-24. The Supreme Court recently reiterated that section 301 preempts claims founded directly on rights created by collective bargaining agreements, and also claims which are substantially dependent on analysis of a collective bargaining agreement. *Caterpillar, Inc. v. Williams*, 107 S.Ct. at 2431. Tort claims such as those alleged in this case may also be governed by the terms of the collective bargaining agreement, and thus preempted. *Allis-Chalmers*, 471 U.S. at 216-18. Therefore, if either wrongful discharge claim is preempted because it is based on rights created by the collective bargaining agreement, then federal jurisdiction exists.

In their second cause of action, appellants specifically alleged that Kaiser breached a covenant of good faith and fair dealing, which appellants contend was an implied provision within the collective bargaining agreement, relying on *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).[4]

The second cause of action clearly is based on an alleged breach of contract between Kaiser and appellants' labor organiza-

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[4] Collective bargaining agreements are to be interpreted by the application of federal law, not state contract law. *Local 174, International Bhd. of Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962). Thus any implication of a covenant of good faith and fair dealing would have to be based on federal, not state law.

tion. *Allis-Chalmers,* 471 U.S. at 216. By placing in issue the terms of the collective bargaining agreement, it is clear that the rights and liabilities of the parties are a product of the collective bargaining agreement itself, and that this claim is thus preempted by section 301. Therefore, federal removal jurisdiction existed, based on the second cause of action.[5] Having properly assumed jurisdiction, the district court correctly dismissed the second cause of action as time-barred.[6]

IV.

Appellants' first cause of action is for wrongful discharge in violation of the public policy of California as expressed in its Labor Code. California restricts an employer's right to discharge its employees at will when such discharge is prohibited by statute or violates public policy. *Tameny v. Atlantic Richfield Co.,* 27 Cal.3d 167, 172, 610 P.2d 1330, 1332-33, 164 Cal. Rptr. 839, 841-42 (1980).

Appellants' claim is based on Cal/OSHA provisions requiring employers to provide a safe place of employment, and prohibiting the discharge of employees who complain of unsafe working conditions to their employer.[7] The district court held that this was an artfully pleaded claim that was preempted by section 301 and dismissed the action as time-barred.

Preemption under the NLRA and the LMRA occurs in three different contexts.[8] *Garmon* preemption exists to protect the

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[5] Appellants voluntarily waived their appeal of the dismissal of this cause of action. *Associated Gen. Contractors v. San Francisco Unified School Dist.,* 616 F.2d 1381, 1384 (9th Cir. 1980) (express waiver of an issue may occur by a statement of abandonment in appellant's brief). We address the issue, however, because it is jurisdictional.

[6] See appellants' concession of this point in footnote 2.

[7] See code provisions in footnote 1.

[8] The National Labor Relations Act ("NLRA"), commonly known as the Wagner Act of 1935, was amended by the Labor Management Relations (Taft-Hartley) Act of 1947, and amended again by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959.

original jurisdiction of the National Labor Relations Board ("NLRB") over conduct which is prohibited or protected by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Therefore, if a claim is preempted under *Garmon* analysis, it is the NLRB, not the courts, which has jurisdiction. Appellees argue that the appellants, by complaining about safety conditions, were engaged in concerted activity which is protected by the NLRA. 29 U.S.C. § 157 (1982). They contend that *Garmon* therefore preempts this wrongful discharge claim. Appellants, as masters of their complaint, did not allege a violation of their rights under the NLRA, but only violations of state statutes and policy. By foregoing their claim based on federal law, the appellants may choose to plead their action as a state claim. *Caterpillar*, 107 S. Ct. at 2431. *Garmon* analysis is therefore not relevant to this case.[9]

A second preemption doctrine involves state laws and causes of action which concern conduct that Congress intended to be unregulated under the NLRA. Here, the conduct is neither prohibited nor protected under the NLRA, and thus is not preempted by *Garmon*. *See Metropolitan Life v. Mass.*, 471 U.S. at 749; *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 529-30 (1979) (plurality opinion).

The final preemption doctrine is under section 301 of the LMRA. As discussed earlier, section 301 preempts any action which is based on a collective bargaining agreement or whose outcome is dependent upon an interpretation of the agreement's terms. *IBEW v. Hechler*, 107 S. Ct. 2161, 2166 (1987); *Allis-Chalmers*, 471 U.S. at 213. While we are primarily concerned with section 301 preemption, the second preemption doctrine is also relevant to this case.

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[9] Furthermore, actions brought or held to arise under section 301 are not preempted under *Garmon*. The strong policy favoring judicial enforcement of such actions sustains the courts' jurisdiction of such cases even where the conduct involved would amount to an unfair labor practice within the NLRB's jurisdiction. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Smith v. Evening News Ass'n.*, 371 U.S. 195, 196-97 (1962).

A.

"[N]ot every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by section 301 or other provisions of the federal labor law." *Allis-Chalmers*, 471 U.S. at 211. The relevant analysis is whether the California tort action "as applied here confers non-negotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. Congress did not intend for section 301 to preempt "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.* at 212.

Appellants' claim is for wrongful discharge based upon violations of state statutes and public policy. A private right of action for wrongful discharge due to safety complaints co-exists with the Cal/OSHA remedial scheme. *Hentzel v. Singer Co.*, 188 Cal. Rptr. 159, 167-68, 138 Cal. App. 3d 290, 303 (1982). California's OSHA regulations protect all workers, irrespective of any labor agreement. State health and safety standards benefit all employees as individual workers, not because they are or are not members of a collective bargaining association. And California's interest in providing this private cause of action is the enforcement of the underlying statute or policy, not to regulate the employment relationship. *Garibaldi*, 726 F.2d at 1374.[10]

Appellants' complaints to their employer indicate a concern that a serious explosion could occur at the worksite. Such an explosion would endanger not only their lives, but the lives of all the workers. Just as the refusal to deliver a spoiled load of milk protected the health and safety of California citizens, *Garibaldi*,

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[10] *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), is distinguishable from *Garibaldi* and this case. Olguin alleged he had been discharged for complaining about mine safety conditions which violated the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (1982 & Supp.III 1985). Thus, Olguin was not acting on behalf of any state law or policy. *Olguin*, 740 F.2d at 1475.

726 F.2d at 1374, the refusal to expose gasoline to sparks and hot machinery protected the health and safety of California citizens.[11]

Thus the tort of wrongful discharge in violation of public policy exists independent of any contractual right. It is true that Article 19 of the collective bargaining agreement states that the employer will comply with all state and federal health and safety laws, including OSHA. This incorporation of existing law does not, however, require an interpretation of the contract terms; it requires an interpretation of the state law. Furthermore, allowing an employer to avoid the effects of state laws by this type of incorporation would subvert congressional intent for the NLRA to coexist with state laws which set labor standards. *Metropolitan Life v. Mass.*, 471 U.S. at 756. The resolution of appellants' wrongful discharge claim therefore depends upon an analysis of Cal/OSHA and California tort law. Since it is not intertwined or substantially dependent upon consideration of the terms of the labor contract, it is not preempted by section 301.

B.

The second preemption doctrine is concerned with state interference with the policies of the NLRA. Congress's main goal in enacting the NLRA was to establish an equitable bargaining process, not to establish any particular substantive terms to which the parties must agree. *Metropolitan Life v. Mass.*, 471 U.S. at 753. State laws which set minimum safety standards do not interfere with the bargaining process itself. To preempt such laws would "allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilater-

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[11] This case is thus distinguishable from *DeSoto v. Yellow Freight Systems, Inc.*, 811 F.2d 1333 (9th Cir. 1987). DeSoto was fired for refusing to drive a truck whose trailer he erroneously believed did not have the proper permits. The fact that DeSoto was mistaken as to the law was central to the court's decision; no such mistaken belief is alleged here. Furthermore, health and safety concerns were not present in the case. Any potential health and safety problems from driving a truck with an unregistered trailer were negated by the fact that the trailer did indeed have the proper permits.

ally." *Metropolitan Life v. Mass.*, 471 U.S. at 755. Such an outcome was obviously not intended by the NLRA. In *Metropolitan Life v. Mass.*, the Supreme Court considered the legislative history of the NLRA and made the following statement:

> Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, *we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety.* The States traditionally have had great latitude under their police power to legislate as " 'to the protection of the lives, limbs, *health,* comfort, and quiet of all persons.' " *Slaughter-House Cases,* 16 Wall. 36, 62 (1873), quoting *Thorpe v. Rutland & Burlington R. Co.,* 27 Vt. 140, 149 (1855). "*States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.* Child labor laws, minimum and other wage laws, *laws affecting occupational health and safety* . . . are only a few examples." *De Canas v. Bica,* 424 U.S. 351, 356 (1976).

471 U.S. at 756 (emphasis added).

Thus, the Supreme Court recognized that Congress did not intend to preempt all local regulations that touch or concern the employment relationship. Minimum state standards for health and safety ordinarily are not inconsistent with the general legislative goals of the LMRA. And in this case, since state OSHA regulations are not incompatible with the federal statutory scheme embodied in the LMRA, federal labor law is nothing more than interstitial in the sense that it merely supplements existing complementary or compatible state law.

Congressional intent not to preempt local health and safety regulations, which might arguably infringe upon federal labor law, also can be discerned from the federal Occupational Safety and Health Act of 1970 ("Fed/OSHA"), 29 U.S.C. §§ 651-78 (1982 & Supp.III 1985). Congress included a provision in Fed/OSHA

whereby the federal government allowed individual states to regulate health and safety, provided the states adopted a scheme or regulation and enforcement at least as vigorous as that required by Fed/OSHA. 29 U.S.C. § 667 (1982). Acting pursuant to this invitation, California enacted the California Occupational Safety and Health Act of 1973 ("Cal/OSHA"), Labor Code § 6300 *et seq.*, which was approved by the Secretary of Labor. 29 U.S.C. § 667(c). The effect of California's enactment of stringent health and safety regulations was to substitute state standards in place of applicable federal standards. By doing so, California furthered the Congressional intent expressed in Fed/OSHA of "encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws. . . ." 29 U.S.C. § 651(b)(11)(1982).

Thus, while safety standards may be a subject of bargaining between the parties, the fact that California has established minimum safety standards does not undercut the collective bargaining process. *Metropolitan Life v. Mass.*, 471 U.S. at 758. A number of statutes analogous to Cal/OSHA have withstood this preemption analysis in the Supreme Court.

In *New York Tel. Co. v. New York Labor Dep't.*, 440 U.S. 519 (1979), the Court was presented with the question whether a state may provide unemployment compensation to strikers in an industry subject to NLRB jurisdiction. A New York statute provided for the payment of unemployment benefits to workers, after an eight-week waiting period, when their employment was terminated by a strike. The benefits were financed primarily by employer contributions. Each employer's contributions were affected by the claims of his employees against the state fund. New York Telephone Company sought a declaratory judgment that the New York statute mandating the payment of benefits to strikers at their employer's expense is inconsistent with national labor policy and therefore invalid under the supremacy clause. *Id.* at 522-25.

There was no majority opinion of the Court; the six Justices in the majority issued three opinions to explain their divergent views. Footnote 28 in *Metropolitan Life v. Mass.* summarized the plurality opinion from *New York Telephone* as follows:

> A plurality opinion affirmed the state-court decision finding no preemption in part on the ground that the 1935 Congress intended to permit the States to make these payments, and in part on the ground that the unemployment insurance statute was a law of general application designed to insure employment security in the State, and not to regulate the bargaining relationship between management and labor.

Metropolitan Life v. Mass., 471 U.S. at 750-51 n.28.

In *Metropolitan Life v. Mass.*, the Court was concerned with a Massachusetts statute which required that certain minimum mental health care benefits be provided to state residents insured by an employee health care plan. The Court held that the NLRA did not preempt the state statute as applied to policies purchased pursuant to collective bargaining agreements. 471 U.S. at 758.

Most recently, the Court addressed a Maine statute which required, in the event of a plant closing, a specific severance payment to all employees not covered by a contract providing for severance pay. This statute, too, was held not to be preempted by the NLRA. *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2223 (1987).

The core analysis in these cases is that none of these statutes interfere with the purposes of the NLRA: the establishment of an equitable bargaining process. Likewise, Cal/OSHA and actions for wrongful discharge in violation of Cal/OSHA do not interfere with the bargaining process. As it is uniquely within the states' police powers to legislate for the health and safety of their citizens, and such regulation does not interfere with the NLRA's goals, federal law does not preempt such statutes.

Therefore, in light of Congressional enactments that foster state regulation of health and safety, and the fact that state regulation of occupational health and safety is a regulation of general application that in no way interferes with the legislative goals of the NLRA or LMRA, we hold that the federal labor laws do not preempt appellants' independent state law cause of action for wrongful discharge.

V.

Appellants' state court complaint contained five additional tort claims: intentional and negligent infliction of emotional distress, assault, peculiar risk, and ultrahazardous activities. The district court held that these claims were not artfully pled, declined to exercise pendent jurisdiction, and remanded them to state court. Appellees petition for a writ of mandamus to compel the district court to retain jurisdiction of these claims.

We must first determine if the remand order is reviewable at all, and if so, whether review should be by appeal or mandamus. For the reasons stated in *Survival Systems v. U.S. District Court*, No. 85-7005, slip op. at __ (9th Cir. August __, 1987), the only avenue of review available is by mandamus.

The statutory preclusion of any type of review under 28 U.S.C. § 1447(d) (1982) is not applicable. Removal was not "without jurisdiction" since appellants' claim for breach of the covenant of good faith and fair dealing was properly held to be preempted by federal law.

The order is not reviewable by appeal since it did not resolve a matter of substantive law. *Clorox Co. v. U.S. District Court*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-78 (9th Cir. 1984). The ruling of the district court was that the appellants' remaining state causes of action were not artfully pleaded federal claims that were preempted by federal law. This ruling does not finally resolve the issue of preemption, which may still be raised as a defense in state court. Thus, if it becomes apparent that any of these causes are indeed based upon the collective bargaining agreement, the defense of preemption could be sustained. Therefore, the only issue decided by the district court was jurisdictional, and review by appeal is not available under *Pelleport* and *Clorox*.

As in *Suvival Systems*, mandamus is not proper here because the district court's order is correct as a matter of law. Slip op. at __. The emotional distress claims, as pled, fit within the Supreme Court's ruling in *Farmer v. United Bhd. of Carpenters and Joiners of America*, 430 U.S. 290, 305 (1977), since they are based on the particularly abusive manner in which the distress occurred.

The remaining actions, for assault, peculiar risk, and ultrahazardous activities, are not based in any way upon the collective bargaining agreement or appellants' discharge, but are based upon activity which is alleged to violate Cal/OSHA. The district court was therefore correct that non-preempted state claims have been alleged. It was within the district court's discretion to then remand these state claims once the federal claim upon which removal was based was dismissed. *Swett v. Schenk*, 792 F.2d 1447, 1450 (9th Cir. 1986). Therefore, there is no justification for granting the extraordinary remedy of a writ of mandamus.

VI.

We affirm the district court's treatment of the second cause of action for breach of a covenant of good faith and fair dealing. The district court properly recharacterized appellants' claim as an artfully pled section 301 action and it correctly dismissed the claim as time-barred. We deny the petition for a writ of mandamus relating to the district court's remand of appellants' third through seventh causes of action. The disposition of the first cause of action, for wrongful discharge in violation of California's health and safety laws, is reversed. We hold that the claim for wrongful termination, based on the state's public policy as expressed in its health and safety regulations, is not preempted by section 301 of the LMRA or the NLRA. We remand this claim to the district court with instructions to remand this claim to the California state court, along with the other state claims. Appellants are entitled to recover their costs on the appeal and the petition for mandamus.

AFFIRMED in part, REVERSED in part, and REMANDED.

Petition for a writ of mandamus is DENIED.

Appendix B

United States District Court
Northern District of California

Case No. C-83-4202 JPV

Donald Paige and Andrew Harris,
Plaintiffs,

vs.

Henry J. Kaiser Co.,
Standard Oil of California,
Chevron of California
and Eugene Green,
Defendants.

[Filed July 11, 1984]

ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANTS AND REMANDING ACTION TO STATE COURT

INTRODUCTION

This action arose out of an employment relationship between plaintiffs Paige and Harris and defendant Henry J. Kaiser Co., which entered into a contract with Chevron Research and its affiliates, defendants Standard Oil and Chevron, to construct the Chevron Coal Liquification Pilot Plant in Richmond, California. Plaintiffs were hired as welding machine tenders, positions which essentially entailed transporting five (5) gallon cans of gasoline and diesel fuel from a central storage location to the numerous welding machines on the construction site. Plaintiffs were to refuel the generators when they ran out of or ran low on fuel. Plaintiffs allege that the prescribed refueling procedure, as well as the conditions under which they were to be performed, created an extreme risk to their health and well-being. Plaintiffs were terminated on July 26, 1982 when, after notifying the project superintendent of the hazard and suggesting certain changes, they refused to continue work until the dangerous conditions were abated.

Defendant Kaiser refused to rehire the plaintiffs and an action was filed on June 24, 1983, in Alameda County Superior Court alleging seven causes of action: (1) wrongful termination in violation of Cal. Labor Code §§ 6310, 6311, 6400, 6401, 6403 and 6404, (2) breach of implied covenant of good faith and fair dealing, (3) intentional infliction of emotional distress, (4) negligent infliction of emotional distress, (5) assault, (6) peculiar risk doctrine and (7) ultrahazardous activity. Defendant removed the case to the district court in September 1983, on grounds that the complaint was an allegation of a breach of a collective bargaining agreement, and as such the claim was within § 301 of the NLRA and subject to federal jurisdiction regardless of diversity or amount in controversy. Cross-motions were filed by the parties and arguments on these motions were heard regularly before this court on June 28, 1984. For the following reasons, defendants' motion for summary judgment is GRANTED in part, and plaintiffs' motion to remand is GRANTED as to remaining state claims.

DISCUSSSION

(A) Jurisdiction/Removal

Although Plaintiffs' complaint is couched entirely in terms of claims under state law, this court can maintain jurisdiction under the "Artful Pleading" doctrine. This doctrine allows the removing court to look at the true underlying nature of a plaintiffs' complaint when the plaintiff has attempted to avoid a federal cause of action by relying solely on state law in the complaint. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983). If it appears that plaintiff, through creative draftsmanship, is trying to avoid a claim where federal law totally occupies the field and compels reliance on a federal remedy, the state claim is preempted and the action is properly removed to the district courts.

Plaintiffs' causes of action for wrongful termination and breach of implied covenant of good faith and fair dealing are clearly contractual claims by an employee against an employer, both of whom are covered by a collective bargaining agreement. Although the entire gamut of labor law is not occupied exclusively

by federal law, claims for violations of a collective bargaining agreement are pre-empted by § 301 of the NLRA. As such plaintiffs first and second causes of action, ostensibly drafted as state claims, are the proper subject of the "Artful Pleading" doctrine and should be characterized as federal claims.

Plaintiffs' reliance on *Garibaldi v. Lucky Foods Stores, Inc.*, No. 83-5686 (9th Cir. Feb. 27, 1984) is misplaced. In that case an employee refused to deliver milk that had spoiled as ordered by the employer, and, therefore, the employee was terminated. The Ninth Circuit, employing a balancing test approach as announced in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), held that the state interest in protecting *all citizens* from tainted food outweighed the federal interest in uniform resolution of collective bargaining labor disputes. Thus, in *Garibaldi*, the wrongful termination claim was not subject to preemption and removal because the claim was based on state public policy as embodied in the Agriculture Code provisions prohibiting sale of tainted milk.

The state public policy interests in workplace safety clearly do not rise to the same height as protecting the public at large from tainted food. Workplace and employee safety are logically areas which fit well within the narrow confines of labor disputes additionally, Cal-OSHA provisions are regularly incorporated into collective bargaining agreements, thus the state interests, in this instance, do not override the strong federal policy favoring a uniform labor dispute resolution process.

(B) Statute of Limitations

Under the "Artful Pleading" doctrine plaintiff's first and second causes of action are properly characterized as federal claims for breaches of a collective bargaining agreement. Such suits brought by employee against employer are not subject to an express period of limitations. The timeliness of such actions is determined as a matter of federal law by reference to the statute of limitation applicable to the vacation of an arbitration award under state law. This is true even though the grievances were not pursued beyond the first step. *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1046 (9th Cir. 1983). All acts occurred in and all

parties are located in California, thus the 100-day statute of limitations contained in Cal. Civil Proc. Code § 1288 will apply.

Since plaintiffs did not pursue their grievances beyond making an initial complaint, which is the first step of the grievance procedure prescribed by the collective bargaining agreement, the latest date at which the statute began to run would be the date of termination, July 26, 1982. Any federal claims for violations of the collective bargaining agreement clearly were extinguished before the action was filed in state court on June 24, 1983. Thus, the first and second causes of action are time-barred and must be dismissed.

(C) Remand of State Claims

Plaintiffs' remaining causes of action cannot be characterized as claims arising under the collective bargaining contract and subject to pre-emption by federal law. Claims 3 through 7 are clearly common law and state tort actions, claims pendent to this court's jurisdiction over the federal causes of action presented by claims 1 and 2. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The federal claims, however, are barred by the appropriate statute of limitations and must be dismissed. With the federal claim dismissed, the causes of action remaining in this federal forum are state claims. As such it is well within this court's discretion to remand the remaining state claims to the state court. But for plaintiffs' pleading tactics, this case would have never left the state forum. This case has not proceeded to a judgment on the merits here, but rather the federal claims have to be dismissed on procedural grounds at this early juncture. No trial date has been set, no discovery has been initiated and the present motions are the first to be filed before this court. Therefore, the interests of judicial economy will not be harmed by remanding these remaining claims to the state court where they were originally filed, where jurisdiction is proper and which is plaintiffs' choice of forum.

CONCLUSION

For the aforementioned reasons, IT IS HEREBY ORDERED that: (1) Defendants' motion for summary judgment is GRANTED to the extent that causes of action numbers 1 and 2 are dismissed because they are barred by the statute of limitations, and (2) Plaintiffs' motion to remand is GRANTED as to the remaining causes of action numbers 3 through 7.

DATED: JUL 11 1984

/s/ J. P. VUKASIN, JR.
J. P. Vukasin, Jr.
United States District Judge

RULE 28.1 LIST

The parent companies of petitioner Henry J. Kaiser Company are Kaiser Engineers Group, Inc. and Raymond Kaiser Engineer Builders, Inc. Henry J. Kaiser Company has no subsidiaries. Its affiliates are:

Foothill Electric Corporation
Kaiser Engineers Australia Pty. Limited
Harrison KE Inc.
Kaiser Engineers, Inc.
Raymond International Service Company
R-KE B Inc.
Raymond Offshore Constructors Inc.
Kaiser Engineers Hanford Company
Kaiser Engineers Of Michigan Inc.
KE Services Corporation
Kaiser Engineers Corporation
Raymond Energy Inc.
Trinity Energy Inc.
Raymond Offshore Constructors Of Delaware, Inc.
Raymond Offshore Constructors (International) S.A.
Kaiser Engineers Americas Inc.
Kaiser Engineers (California) Corporation
KE, Inc. #2
Kaiser Engenharia E Construcoes Limitada
Raymond Fabricators, Inc.
Kaiser Engineers International, Inc.
Kaiser Engineers And Constructors, Inc.
Blackhawk Terminals Inc.
Kaiser Engineers Maintenance Company
Henry J. Kaiser Company (Canada) Ltd.
Kaiser Ingenieria De Chile Limitada
Kaiser Engineers Limited
KE, Inc. #1
Kaiser Engineers Power Corporation
Kaiser Engineers Asia Limited
Phillips Barratt Kaiser Engineers Ltd.

Petitioner Standard Oil Company of California is now known as Chevron Corporation. It has no parent company. Chevron Corporation and Chevron U.S.A. Inc. are the parent companies of petitioner Chevron Chemical Company. A list of Chevron Corporation's subsidiaries

and affiliates, which includes all affiliates and subsidiaries of Chevron Chemical Company, is as follows:

American Overseas Petroleum Limited
  American Overseas Petroleum (Spain) Limited
Arabian Chevron Overseas Limited
Arabian Chevron, Inc.
AMAX Inc.
Bahama California Oil Company
California (Nigeria), Incorporated
  Chevron Oil Company (Nigeria)
California Asiatic Oil Company
  Chevron Darajat Limited
  Chevron Jambi Inc.
  Chevron Langsa Inc.
  Chevron Natuna Inc.
  Chevron Nauka Inc.
  Chevron Oil Company (Nigeria)
  Chevron Oil Company of Spain
  Gulf Oil Zaire S.A.R.L.
Caltex Petroleum Corporation
Chevron do Brasil Participacoes e Empreendimentos Ltda.
Chevron Amazon Petroleum Company
Chevron Australia Transport Pty., Ltd.
  Northwest Shelf Shipping Service Company Pty. Ltd.
Chevron Bahia Petroleum Company
Chevron Bahia Sul Petroleum Company
Chevron Canada Limited
  Chevron Canada Resources Limited
    Cansulex Limited
    Glen Park Gas Pipeline Company Limited
    Rimbey Pipe Line Co. Ltd.
    Standard Development Company Limited
    Sultran Ltd.
  Chevron Minerals Limited
  Conwallis Arctic Oils Limited
  Furnace Oil Sales Ltd.
  Irving Oil Company, Limited
    Irving Oil Limited
      Canaport Limited
      Irving California Oil Company Ltd.
      Irving Oil Terminals Ltd.

Irving Oil Limited
Canaport Limited
Irving California Oil Company Ltd.
Irving Oil Terminals Ltd.
Standard Oil Company of British Columbia (1981) Limited
Chevron Coal Development Company
Chevron Environmental Health Center, Inc.
Chevron Exploration Corporation
Chevron Exploration Corporation of Chile
Chevron Exploration Corporation of Sudan
Chevron Foreign Service Corporation
Chevron Guaratuba Petroleum Company
Chevron Iguape Petroleum Company
Chevron Indonesia Oil Company
Chevron Industries, Inc.
Chevron Mineral Corporation of Ireland
Compania Minera Chevron Dominicana, S.A.
Chevron International Oil Company, Inc.
Aircraft Fuel Supply B.V.
Chevron Belgium Refining
Chevron Erdoel Handels G.m.b.H.
Caltex Deutschland G.m.b.H.
Chevron Functional Fluids, Inc.
Chevron International Services, Inc.
Chevron International Trading Company—West Africa
Chevron Italiana Marina Aviazione S.p.A.
MARS—Milan Airport Refuelling Services S.p.A.
SERAM—S.p.A.
Chevron Oil (Switzerland)
Mittelland Refinery Limited
SARACO S.A.
TAR—Tankanlage Ruemlang A.G.
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Chevron Oil Latin America, Inc.
Chevron Oil Trading Company
Compania Minera Chevron Dominicana, S.A.
Maasvlakte Olie Terminal N.V.
Rotterdam-Antwerpen Pijpleiding (Belgie) N.V.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Sunset Oil Trading Limited
Chevron Itajai Petroleum Company

Chevron Land and Development Company
C-W Properties, Inc.
Glenwood Properties
Ontario Center, The
Pacific Coast Homes
Supulveda Properties, Inc.
Chevron Maranhao Petroleum Company
Chevron Maritime Transport Corporation
Chevron Mineral Corporation of Ireland
Chevron Natural Gas Services, Inc.
Chevron Nile Services Limited
Chevron Oceanic, Inc.
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Trans-Arabian Pipe Line Company
Arabian Chevron Trading Company
Associated Octel Company Limited, The
A.K. Chemie G.m.b.H.
Associated Octel Company (Plant) Limited
Associated Octel Company (South Africa) (Proprietary) L
Octel Societe Anonyme
Societa Italiana Additivi per Carburanti SpA (S.I.A.C.)
Societe Octe-Kuhlmann
Chevron Capital N.V.
Chevron Oceanic (Middle East), Inc.
Chevron Oil and Chemical Company AB
Chevron Oil Company of The Netherlands
Gulf Oil (Nederland) Exploration and Production Company
Chevron Oil Service Company
Chevron International Oil Company Limited
Hydrant Servicing Company Limited
Quotegem Limited
United Kingdom Oil Pipelines Limited
Chevron Oil (Ireland) Limited
Chevron Petroleum (U.K.) Limited
British Kewanee, Inc.
Kewanee Oil Company (U.K.) Limited
Chevron Exploration North Sea Limited
Chevron Petroleum Company Limited
Chevron Oil, Sociedad Anonima
N.V. Rotterdam-Rijn Pijpleiding Maatschappij

Chevron Oil & Chemical Company Pty. Ltd.
Chevron Oil and Chemical Company Limited
Chevron Oil and Chemical Company Oy
Chevron Oil Company of Central African Republic
Chevron Oil Company of Chad
  Societe d'Etude et d'Exploitation de la Raffinerie du Tch
Chevron Oil Company of Egypt
Chevron Oil Company of Gabon
Chevron Oil Company of Germany
Chevron Oil Company of India
Chevron Oil Company of Ireland
Chevron Oil Company of Italy S.p.A.
Chevron Oil Company of Japan
Chevron Oil Company of Korea
Chevron Oil Company of Niger
Chevron Oil Company of Portugal
Chevron Oil Company of Senegal
Chevron Oil Company of Sudan
Chevron Oil Company of Syria
Chevron Oil Company of The Gambia
Chevron Oil Company of The Philippines
Chevron Oil Company of Uruguay
Chevron Oil Company of Yugoslavia
Chevron Oil Company of Yugoslavia (Jabuka)
Chevron Oil Company of Yugoslavia (Mljet)
Chevron Oil Exploration Company of Greece
Chevron Oil Field Research Company
Chevron Orient, Inc.
Chevron Overseas Finance Company
  Chevron Oil Company of Venezuela
    Tierras e Inversiones Venezuela, C.A.
  Compania Petrolera Chevron, Ltd.
Chevron Overseas Petroleum Inc.
  Gulf Oil Zaire S.A.R.L.
Chevron Petroleum Company of Brazil
Chevron Petroleum Company of Colombia
Chevron Petroleum Company of Norway
Chevron Petroleum Norge A/S
Chevron Pipe Line Company
  Chevron Alaska Pipe Line Company
  Chevron Raven Ridge Pipe Line Company
Chevron Porto Belo Petroleum Company

Chevron Research Company
B.V. Chevron Centrale Laboratoria
Chevron do Brasil Ltda.
Chevron Research Company (Japan) Ltd.
Compania Minera Chevron Dominicana, S.A.
Chevron Sao Luis Petroleum Company
Chevron Sao Marcos Petroleum Company
Chevron Shale Oil Company
Chevron Shipping Company
Chevron Solemar Petroleum Company
Chevron Standard Limited
Chevron Canada Resources Limited
Cansulex Limited
Glen Park Gas Pipeline Company Limited
Rimbey Pipe Line Co. Ltd.
Standard Development Company Limited
Sultran Ltd.
Chevron Stations, Inc.
Chevron Tankers (Nederland) B.V.
Chevron Telecommunications Company
Chevron U.S.A. Inc.
American Gilsonite Company
American Personnel Services Inc.
Atlas Supply Company
Australian Gulf Oil Company
Bolivian Gulf Oil Company
Cabinda Gulf Oil Company
Cabinda Gulf Oil Company Limited
California Company, The
Canyon Reef Carriers, Inc.
Chandeleur Pipe Line Company
Chevron Capital U.S.A. Inc.
Chevron Chemical Company
Aditivos Mexicanos, S.A. de C.V.
BGD Company
Chevron do Brasil Ltda.
Chevron Chemical (Canada) Limited
Later Chemicals Limited
Chevron Chemical (Far East) Private Limited
Chevron Chemical (FSC)
Chevron Chemical Company S.A.F.
Deutsche Ortho G.m.b.H.

Chevron Chemical International Sales, Inc.
Chevron Chemical International, Inc.
Chevron Chemical, S.A.
Chevron Chemical G.m.b.H.
Chevron International Chemicals Inc.
Coromandel Fertilisers Limited
Crediton Enterprises, Inc.
Gulf Chemicals International, Inc.
Plastigama S.A.
Insecticidas Ortho, S.A.
Internacional de Basicos y Quimicos, S.A. de C.V.
Karonite Chemical Company, Limited
Nippon Petroleum Detergent Company, Limited
Orogil, S.A.
Penrith Enterprises, Inc.
Petrosynthese S.A.
Quimicas Ortho De California, Limitada
Ripon Enterprises, Inc.
Spirolite Corporation
Chevron Geothermal Company of California
Chevron Germany Inc.
Chevron Investment Management Company
Chevron Italia Oil Company S.p.A.
Chevron Oil Finance Company
Chevron Petroleum Company of The Netherlands
Chevron Sulawesi Inc.
Chevron Travel Club, Inc.
Chevron Travel Club Services Company
CLP Corporation
Dixie Pipeline Company
Douala Gulf Oil Company
Ecuadorian Gulf Oil Company
Explorer Pipeline Company
Federal Engineering Corporation
Compania Comercial Chevron, S.A.
Felix Oil Company
Gulf Agricultural Chemicals Company Limited
Compania Minera Chevron Dominicana, S.A.
Gulf (U.K.) Offshore Investments Limited
Gulf Oil (Great Britain) Limited
Gulf Oil North Sea Limited

Gulf Oil Refining Limited
London Oil Refining Co. Limited, The
London Oil Refining Co. Limited, The
Gulf Oil North Sea Limited
Lorco Oils (North) Limited
Lorco Oils (North) Limited
Gulf Oil (U.K.) Limited
Gulf Oil Zaire S.A.R.L.
Gulf Auto Club, Inc.
Gulf Oil Communications Company, Inc.
Gulf Oil Company of Gabon
Gulf Oil Company-Eastern Hemisphere
Gulf Oil Realty Company
Gulf Reston Properties, Inc.
Gulf Research & Development Company
Compania Minera Chevron Dominicana, S.A.
Gulf Oil Company (Nigeria) Limited
Gulf Oil Zaire S.A.R.L.
Plaschem International Co. (Hong Kong) Limited
GOC Acquisition Corporation
Intermountain Geothermal Company
International Bitumen Emulsions Corporation
Kenai Pipe Line Company
Kewanee Industries, Inc.
Kewanee Overseas Oil Company
Netherlands Kewanee, Inc.
Long Beach Oil Development Company
Lost Hills Water Company
Mid-Valley Pipeline Company
Murvale Company
Norske Gulf Production Company A/S
Paloma Pipe Line Company
Pembroke Capital Company Inc.
Petroleum Facilities, Inc.
Pittsburg & Midway Coal Mining Co., The
Solvent Refined Coal International, Inc.
Plantation Pipe Line Company
Platte Pipe Line Company
Powell Bend Mining Co.
South Pacific Gulf Oil Company
Standard Gas Company
Standard Gasoline Company

Standard Oil Company
Standard Oil Company of Texas, Inc.
Standard Pacific Gas Line Incorporated
Standard Pipe Line Company
Suriname Gulf Oil Company
Transocean Group, Inc.
Transinsco, Inc.
Transocean Gulf Oil Company
Bermaco Insurance Company Limited
Insco Limited
Britamco Limited
Cayman Kewanee Limited
Chevron Caribbean Investments Inc.
Chevron International Limited
Balinesian Gulf Oil Limited
Chevron Barreirinhas Exploration Limited
Chevron Servicos de Petroleo Ltda.
Chevron International (Argentina) Limited
Chevron International (Malaysia) Limited
Chevron International Italy Limited
Chevron International Somalia Limited
Chevron International Yugoslavia Limited
Chevron LNG Shipping Company Limited
International Gas Transportation Company Limited
Chevron Transport Corporation
Chevron Product Carriers Corporation
Gulf Musandam Petroleum, Limited
Gulf Oil (Ireland) Limited
Gulf Oil of Colombia Limited
Gulf Oil Australia Pty. Ltd.
Gulf Oil Egypt Limited
Gulf Oil Pakistan Limited
Gulf Oil Ras Al-Khaimah Limited
Gulf Oil Shadwan Limited
Gulf Oil Suez Limited
Gulf Oil Terminals (Ireland) Limited
Britama Tankers Limited
Gulf Oman Petroleum Limited
Kupan International Company Pension Plan Trustees L
Natuna Gulf Oil Limited
New Frontiers Limited
Niugini Gulf Oil Pty. Limited

Sumatra Gulf Oil, Limited
Tunisian Gulf Exploration and Production Company
Chevron Marine and Services Company Limited
Chevron Transport Corporation
Chevron Product Carriers Corporation
Compania Minera Chevron Dominicana, S.A.
Eastern Gulf Oil Company Limited
Britama Tankers Limited
Global Energy Operations and Management Company, Ltd.
Gulf (U.K.) Offshore Investments Limited
Gulf U.K. Offshore Exploration Company Limited
Gulf Kuwait Company
Burgan Pension Fund Trustees Limited
Kuwait Oil Company Limited
Burgan Pension Fund Trustees Limited
Kuwait Oil Company Trustees Limited
Kuwait Oil Company Trustees Limited
Gulf Oil (Ireland) Limited
Gulf Oil (U.K.) Limited
Britama Tankers Limited
Chevron Chemical U.K. Limited
Chevron Pension Fund Trustee Company Limited
Chevron Pension Fund Trustee Company Limited
Gulf International Trading Company (Europe) L
Gulf Oil Financial Services Company Limited
Gulf Oil Refining Limited
Gulf Pension Fund Trustee Company Limited
Gulf International Trading Company (Europe) Limited
Gulf Oil (Great Britain) Limited
Gulf Oil North Sea Limited
London Oil Refining Co. Limited, The
Gulf Oil Refining Limited
Gulf Oil North Sea Limited
Lorco Oils (North) Limited
London Oil Refining Co. Limited, The
Lorco Oils (North) Limited
Gulf Oil Financial Services Company Limited
Chevron Chemical U.K. Limited
Gulf Oil Terminals (Ireland) Limited
Gulf Pension Fund Trustee Company Limited
Gulf Pension Fund Trustee Company Limited
Chevron Pension Fund Trustee Company Limited

Gulf International Trading Company (Europe) Limited
Chevron Chemical U.K. Limited
Gulf Oil Financial Services Company Limited
Gulf Oil Refining Limited
Kewanee Oil Company (U.K.) Limited
Gulf Oil Company (Nigeria) Limited
Gulf Oil Finance N.V.
Gulf Oil Services, Inc.
Gulf Oil Zaire S.A.R.L.
Gulf U.K. Offshore Exploration Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Mene Grande Oil Company
Norwegian Gulf Exploration Company A/S
Plaschem International Co. (Hong Kong) Limited
Venezuela Gulf Refining Company
Warren Petroleum, Inc.
West Texas Gulf Pipe Line Company
Western States Geothermal Company
Zaire Gulf Oil Company
Gulf Oil Zaire S.A.R.L.
Chevron Ubatuba Petroleum Company
Chevron Venezuela Services Inc.
Compania de Petroleo Chevron S.A.
Compania Comercial California S.A.
Compania Comercial Conchan S.A.
Compania Minera Chevron de Espana, S.A.
Compania Minera Chevron Dominicana, S.A.
Compania Minera Chevron, Inc.
Compania Petrolera Chevron
Compania Petrolera Chevron Nicaragua
Compania Petrolera Chevron, Inc.
Cornwallis Arctic Oils Limited
Crest Exploration Limited
Far Eastern Petroleum Company Limited
Chevron Overseas Petroleum Limited
BORCO Towing Company Limited
Freeport Trading Company Limited
Marine Agents and Brokers Limited
Overseas Petroleum Company Limited
BORCO Towing Company Limited

Freeport Trading Company Limited
Marine Agents and Brokers Limited
River Nile Petroleum Company Limited
White Nile Petroleum Company Limited
Gasolinas Chevron de Puerto Rico Inc.
Gulf Oil Corporation
Huntington Beach Company
Huntington Pacific Corporation
Huntington Seacliff Corporation
Mansion Properties, Inc.
Iran Chevron Oil Company
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Kelmac, Inc.
Ukamar Limited
Oil Insurance Limited
Oil Investment Corporation Ltd.
Oil Investment Corporation Ltd.
P. T. Caltex Pacific Indonesia
Pacific Oil Company
Petroleum Buildings, Inc.
Refineria Petrolera de Guatemala-California, Inc.

Standard Oil Company
Standard Oil Company of California
Standard Oil Company of Delaware
Standard Oil Company, Inc.
Standard Oil Company, Ltd.
Standard Oil Sales Co., Inc.
UNC Incorporated
Western Company, The
Western Transnav Company

Supreme Court, U.S.
FILED
DEC 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-924

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

HENRY J. KAISER COMPANY,
STANDARD OIL COMPANY OF CALIFORNIA,
CHEVRON CHEMICAL COMPANY
AND EUGENE GREEN,
Petitioners,

v.

DONALD PAIGE AND ANDREW HARRIS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where Congress, through the enactment of Fed/OSHA, has declared its intent that the states regulate workplace safety, does Section 301 of the Labor Management Relations Act preempt union employees' state law claim that they were wrongfully discharged for refusing to work under conditions which violated California's health and safety laws?

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No. 87-924

In the Supreme Court

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OCTOBER TERM, 1987

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v.

DONALD PAIGE AND ANDREW HARRIS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1982, petitioner Henry J. Kaiser Company ("Kaiser") was constructing a coal liquification plant for petitioner Chevron Oil Company ("Chevron") at Chevron's Richmond, California refinery. The plant was four to eight stories in height and consisted primarily of heavy pipe. Respondents Donald Paige and Andrew Harris were employed by Kaiser as welding machine tenders pursuant to a collective bargaining agreement between Kaiser and Operating Engineers Local 3. Respondents spent two to three hours per day fueling the gasoline generators which supplied electricity to the arc welders who were working throughout the structure.

Kaiser required Paige and Harris to fuel the generators under extremely dangerous conditions which violated the California

Occupational Safety and Health Act ("Cal/OSHA")[1]. Specifically, Kaiser provided Paige and Harris with two defective five-gallon cans for carrying gasoline to the generators. Neither can had a spark arrestor; both were beaten up. One can had a defective latch which permitted gas to spill out. To reach a generator which needed refueling, Paige and Harris had to walk through the job site and under the workers who were welding above them. The welding gave off sparks, which fell on or near them as they carried their damaged and leaking gas cans.

The danger was compounded by Kaiser's insistence that the generator gas tanks be filled even though the engine manifold was hot—a practice which directly violated the instructions printed on each generator. The likelihood of an explosion due to Kaiser's refusal to follow the instructions was greatly heightened by the fact that the funnels on the gas cans were broken and leaked when gasoline was poured into the tank.

For more than a week, Paige and Harris made numerous efforts to have Kaiser correct the dangerous working conditions. Despite these efforts, Kaiser did not replace the defective gas cans and funnels and rejected various alternatives which would have permitted the safe refueling of the generators. On July 26, 1982, having reasonably concluded that conditions would never be made safe and that the risk of a serious explosion was therefore high, Paige and Harris refused to fuel the generators. Kaiser's project supervisor responded by immediately firing them. The next day the project supervisor and a representative from Local 3 discussed the termination at a short meeting from which Paige and Harris were excluded. At the conclusion of the meeting, the Local 3 representative told respondents that nothing could be done about their terminations.

Paige and Harris filed a state court action challenging their termination and the unsafe working conditions. Their complaint alleged seven tort claims under California law: (1) wrongful discharge in violation of California's public policy concerning worksite safety as expressed in Cal/OSHA; (2) wrongful dis-

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[1] Cal. Lab. Code § 6300 *et seq.*

charge in violation of the convenant of good faith and fair dealing; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) assault; (6) "peculiar risk" based on Chevron and Standard's intentional and willful refusal to take precautions against the harm posed by the refueling procedures; and (7) "ultrahazardous activity" based on petitioners' requiring Paige and Harris to perform the task of refueling the generators under ultrahazardous conditions.

The petitioners removed the case to federal court pursuant to 28 U.S.C. § 1441. In response to the parties' cross-motions to remand and for summary judgment, the district court, applying the artful pleading doctrine, found that the claim for wrongful discharge in violation of public policy and the claim for breach of covenant were in fact actions under section 301 of the Labor Management Relations Act (LMRA)[2], and were therefore subject to removal. Having assumed jurisdiction, the court dismissed the two section 301 claims because they were barred by the applicable statute of limitations. With respect to the remaining five tort claims, the court held that they were not artfully pled causes of action, declined to exercise pendent jurisdiction and remanded them to the state court. A-16-19.[3]

Both parties sought appellate review of the district court's decision. Paige and Harris appealed the dismissal of their claim for wrongful discharge in violation of public policy[4] and petitioners sought a writ of mandate directing the district court to vacate that portion of its order remanding the third through seventh causes of action to the state court.

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[2] 29 U.S.C. § 185(a).

[3] References to "A- " are to Appendices A and B of the Petition for Writ of Certiorari.

[4] Respondents also noticed an appeal of the decision dismissing their breach of covenant claim. However, in their opening brief to the Ninth Circuit, they waived their appeal of this issue. The Ninth Circuit addressed the issue of whether the covenant claim was preempted only for the purposes of establishing that federal jurisdiction existed and that therefore the case was properly removed. A-7.

Ruling on respondents' appeal, the Ninth Circuit held that the wrongful discharge claim, based on California's public policy as expressed in Cal/OSHA, was not preempted by section 301 of the LMRA or the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* In reaching this conclusion, the court correctly applied the various labor law preemption doctrines enunciated by this Court. Thus, the circuit court found no preemption under section 301 since the wrongful discharge claim is not dependent on the terms of the collective bargaining agreement but is instead based solely on the state's health and safety laws which are applicable to all workers, whether or not they are union members. A-9-10. Moreover, according to the court, allowing the state wrongful discharge claim to proceed does not interfere with conduct which Congress intended to be unregulated under the NLRA. Indeed, as the court recognized, Congress, through the federal Occupational Health and Safety Act of 1970 ("Fed/OSHA")[5], expressed its preference for state regulation of workplace safety so long as minimum standards are met. 29 U.S.C. § 667. A-10-13. Finally, the court found no preemption under the *Garmon* analysis[6] because the respondents, "as masters of their own complaint, did not allege a violation of their rights under the NLRA, but only violations of state statutes and Policy." A-8.

The Ninth Circuit denied Kaiser's petition for writ of mandate. The court carefully limited its holding to an affirmance of the district court's finding that the third through seventh causes of action, as pled, did not state claims under section 301 and therefore did not provide a basis for federal question jurisdiction.[7]

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[5] 29 U.S.C. § 651 et seq.

[6] The preemption doctrine enunciated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) exists to protect the jurisdiction of the National Labor Relations Board over activities which are arguably protected or prohibited by the NLRA.

[7] Specifically, the court held that the emotional distress claims alleged a particularly abusive manner in which the distress occurred and thus, as pled, were not preempted under *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290 (1977). The court

The court noted that this finding did not preclude petitioners from asserting preemption as a defense to these claims in the state court:

> This ruling does not finally resolve the issue of preemption, which may still be raised as a defense in the state courts. Thus, if it becomes apparent that any of these causes are indeed based upon the collective bargaining agreement, the defense of preemption could be sustained.

A-14.

Thus, at this juncture in the litigation, there has been no final resolution of the preemption issue with regard to the third through seventh causes of action. It may be that upon remand the California courts will decide that preemption provides a defense to one or more of these causes of action.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS BECAUSE CALIFORNIA'S OCCUPATIONAL HEALTH AND SAFETY SCHEME, UNLIKE THE STATE EMPLOYEE PROTECTIVE LAWS AT ISSUE IN OTHER CASES, IS BASED ON FED/OSHA WHICH EXPRESSLY DECLARES CONGRESS' INTENT THAT WORKPLACE SAFETY BE REGULATED BY THE STATES

A. Whether a state law claim for wrongful discharge based on a violation of Cal/OSHA is preempted by federal labor law is a question of Congressional intent. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Malone v. White Motor Co.*, 435 U.S. 497, 504 (1978). Since Congress has not stated explicitly in

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further found that the claims for assault, peculiar risk and ultrahazardous activity were based on allegations of activities which violated Cal/OSHA and therefore were not dependent on the collective bargaining agreement.

the NLRA/LMRA the extent to which these statutes preempt state law, the federal courts, in most instances, must attempt to discern Congress' intent by determining whether the state law conflicts with federal law or would frustrate the federal labor scheme, or whether it is apparent from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states. *Allis-Chalmers*, 471 U.S. at 209; *Metropolitan Life*, 471 U.S. 724. Respondents submit that the conflict among the circuits on the issue of whether certain state law claims are preempted (Petition 7, nn.2, 3, 4) is due to the varying ways in which the courts have applied these principles and the distinct preemption doctrines derived from them.

In contrast to the situations presented in the decisions cited by petitioners, determining Congress' intent with regard to the state regulation of workplace safety is not dependent on an analysis of the NLRA/LMRA or the application of the principles used to determine the preemptive reach of these statutes. Here, Fed/OSHA unambiguously sets forth Congress' position. This expression of intent may properly be relied on in determining the extent of federal labor law preemption. *New York Telephone v. New York Dept. of Labor*, 440 U.S. 519, 536 (1979); *Malone v. White Motor Co.*, 435 U.S. at 505.

Fed/OSHA makes two important points relevant to Congress' intent concerning the relationship between federal and state occupational safety laws and federal labor policy:

> 1. A federal statutory scheme which establishes minimum health and safety standards for both union and non-union workers does not conflict with, but instead is complementary to, the federal collective bargaining laws. *Marshall v. N.L. Industries*, 618 F.2d 1220 (7th Cir. 1980). This comprehensive scheme includes a prohibition on the retaliatory discharge of persons who avail themselves of the protections of Fed/OSHA, 29 U.S.C. § 660(c)(1), and provides for court enforcement of this provision by the Secretary of Labor. 29 U.S.C. § 660(c)(2); *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980); *Marshall v. N.L. Industries*, 618 F.2d 1220.

2. Fed/OSHA supplants any existing state occupational safety regulations. However, under Fed/OSHA, Congress strongly "encourage[s] the states to [re]assume the fullest responsibility for the administration of their occupational health and safety laws . . . ," 29 U.S.C. § 651(b)(11), so long as the states' scheme of regulation and enforcement is at least as vigorous as that required by Fed/OSHA. 29 U.S.C. § 667.

Pursuant to this Congressional invitation, California enacted the California Safety and Health Act, Cal. Lab. Code § 6300 *et seq.*, which was approved by the Secretary of Labor.

Thus, Fed/OSHA leaves no doubt that California's occupational health scheme, including the tort of retaliatory discharge, is sanctioned by Congress. Indeed, given the fact that Congress has delegated its authority to regulate workplace safety to California, it is more accurate to treat Cal/OSHA as if it were a federal law. When so viewed, the question is no longer one of preemption but of accommodation between two federal statutes.[8]

When faced with the problem of accommodating the NLRA/LMRA with other federal statutory schemes, this Court and the courts of appeal have uniformly concluded that the NLRA/LMRA must give way to allow for the enforcement of the other federal statute. This conclusion has been reached despite the NLRA's presumption in favor of arbitration and the exhaustion of administrative remedies. *See, e.g., Barrentine v. Arkanas-Best Freight System*, 450 U.S. 728 (1981) (Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*); *McDonald v. City of West Branch*, 466 U.S. 384 (1984) (Civil Rights Act of 1871, 42 U.S.C. § 1983); *Atchison, Topeka, and Sante Fe Ry. Co. v. Buell*, ____ U.S. ____, 107 S.Ct. 1410 (1987) (Federal Employers'

[8] See, *New York Telephone v. New York State Dept. of Labor*, 440 U.S. at 539, n.32, Opinion of Justices Stevens, White and Rehnquist. Justice Brennan in his concurring opinion in *New York Telephone* also expressed support for this position. *Id.* at 546 n*.

Liability Act, 45 U.S.C. § 51 *et seq.*);[9] *Marshall v. N.L. Industries*, 618 F.2d 1220 (7th Cir. 1980) (Fed/OSHA); *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *Airline Pilots Ass'n v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980) (ERISA, 29 U.S.C. § 1001 *et seq.*).

Thus, Fed/OSHA and its declaration of Congressional intent provide a basis for the Ninth Circuit's finding of no preemption which is separate and distinct from the preemption analysis in *Lingle v. Norge Division of Magic Chief, Inc.*, 823 F.2d 1031 (7th Cir.), *cert. granted*, ____ U.S. ____,108 S.Ct. 226 (1987) and *Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987). *Lingle* and *Baldracchi* reached opposite conclusions on the issue of whether section 301 of the LMRA preempts the state law claim of an employee, covered by a collective bargaining agreement, who asserts he was discharged in retaliation for filing a state worker's compensation claim. By granting certiorari in *Lingle*, this Court has decided that this conflict should be resolved.

However, contrary to petitioners' assertion, Paige and Harris' case against Kaiser is not another example of one side of this conflict. The courts in *Lingle* and *Baldracchi* decided the preemption issue under their respective interpretations of this Court's decision in *Allis-Chalmers v. Lueck*, 471 U.S. 202. In neither case was there an independent statement of Congressional intent, analogous to that which appears in Fed/OSHA, which explicitly and unconditionally sanctioned the state's implementation of a worker's compensation scheme for *all* employees. This critical difference provides a sound basis for rejecting petitioners' request the certiorari be granted in this case and argument set at the same time as *Lingle*, or, in the alternative, that certiorari be granted and the case held in abeyance pending the decision in *Lingle*. Petition 8-9, n.5.

B. Respondents also suggest that Paige and Harris' third through seventh causes of action provide an opportunity for this court to rule on a "battery" of state tort actions and therefore this

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[9] *Buell* involves accommodations of the FELA and the Railroad Labor Act (RLA). Although the RLA and the NLRA differ in certain respects, those differences do not affect the analysis here.

case creates a better vehicle for a wide-ranging exploration of federal labor law preemption than the single cause of action in *Lingle*. Petition 8. This suggestion should be rejected.

First, the Ninth Circuit's holding that the third through seventh causes of action, as pled, do not state a federal claim under section 301 is clearly correct. A-14-15. In the third and fourth causes of action for infliction of emotional distress, respondents are alleging that Kaiser and Chevron, in effect, threatened their physical well-being by requiring them to work under illegal and extremely unsafe conditions. These allegations state claims completely independent of the labor contract. Similarly, the claims for assault, peculiar risk and ultrahazardous activity are not dependent on the contract because each is based on alleged violations of Cal/OSHA. A-14-15. *Caterpiller Inc. v. Williams*, ____ U.S. ____, 107 S.Ct. 2425, 2432, n.10 (1987); *Allis-Chalmers*, 471 U.S. at 211.

Second, the Ninth Circuit limited its decision to a finding that the five claims do not arise under federal law, thus properly leaving to the state court the determination whether preemption is a defense to any of these claims. A-14. *Caterpiller Inc. v. Williams*, 107 S.Ct. at 2432-33. Given the role of the state courts, it would be premature for this Court to reach the wide range of preemption issues which petitioners urge this court to decide.[10]

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[10] Indeed, to even reach the question of preemption as a defense, the Court would need to first find that the district court had abused its discretion by remanding the five state tort claims instead of exercising pendent jurisdiction over them. Unless such an abuse is shown, the defense of preemption is not before the Court. A-15.

II

THE NINTH CIRCUIT'S DECISION PROPERLY CONCLUDED THAT SECTION 301 DOES NOT EMPOWER EMPLOYERS AND UNIONS, THROUGH THEIR COLLECTIVE BARGAINING AGREEMENT, TO ALTER THE SUBSTANTIVE STANDARDS, REMEDIES, AND PROCEDURES PROVIDED BY CALIFORNIA'S OCCUPATIONAL SAFETY LAWS

In section II of the petition, Kaiser argues that this case presents an important issue of law because the Ninth Circuit's preemption analysis erroneously imposed a "balancing" test which ignored the grievance and arbitration provisions of the collective bargaining agreement. Petition 9. This argument both misconstrues the Ninth Circuit's reasoning and misstates the law.

Reduced to its simplest terms, petitioners' argument is that section 301 empowers employers and unions, through their collective bargaining agreement, to alter California's occupational safety standards, remedies and procedures. Under petitioners' theory, there is no limit on the potential preemptive effect of collective bargaining agreements over state law—if the agreement addresses and makes arbitrable an issue that overlaps a state protective law such as Cal/OSHA, the state law, to that extent, is necessarily preempted. Thus, while Kaiser here contends only that the common law retaliatory discharge aspect of California's occupational safety scheme is preempted, the result would be conceptually identical with respect to any other provision of the law which was arguably covered by the collective bargaining agreement.[11]

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[11] The total illogic of petitioners' position can be seen from their citation, with approval, of Cal/OSHA's statutory remedy for a worker who is discharged in retaliation for complaining about safety matters. Cal. Lab. Code § 6310. Petition 5, n.1. Petitioners can offer no rationale for why the remedy under section 6310 survives preemption while the state common law wrongful discharge remedy is displaced. For purposes of preemption analysis, the two claims are identical, i.e., they both provide a state law remedy for retaliatory discharge to unionized and

Petitioners rely on this Court's recent decisions in *Allis-Chalmers*, 471 U.S. 202, and *International Brotherhood of Electrical Workers v. Hechler*, ____ U.S. ____, 107 S.Ct. 2161 (1987) to support their limitless preemption theory. Petition 10-11. This reliance is misplaced. Those cases explain the circumstances in which the federal common law governing collective bargaining agreements will preempt state claims which are not by their terms actions for breach of contract, but nonetheless are "derive[d] from the contract." *Allis-Chalmers*, 471 U.S. at 218. While holding such claims preempted, the Court was careful to point out that Congress did not intend federal labor law to displace state labor standards and remedies which are independent of the contract, i.e., standards and remedies which exist even if there is no collective bargaining agreement. *Allis-Chalmers*, 471 U.S. at 211-12.[12]

The Ninth Circuit correctly applied the teachings of this Court in holding that respondent's wrongful discharge claim was not dependent on the labor contract:

> Thus the tort of wrongful discharge in violation of public policy exists independent of any contractual right. It is true

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non-union employees. Petitioners' admission that the statutory remedy survives defeats their entire argument.

[12] As stated by the Court:

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever labor standards they disfavored. Clearly, § 301 does not grant parties to a collective bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with Congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obilgations independent of a labor contract.
>
> *Allis-Chalmers*, 471 U.S. at 211-212.

See also Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 756.

> that Article 19 of the collective bargaining agreement states that the employer will comply with all state and federal health and safety laws, including OSHA. This incorporation of existing law does not, however, require an interpretation of the contract terms; it requires an interpretation of state law. Furthermore, allowing an employer to avoid the effects of state laws by this type of incorporation would subvert Congressional intent for the NLRA to coexist with state laws which set labor standards. *Metropolitan Life v. Mass.*, 471 U.S. at 756. The resolution of appellants' wrongful discharge claim therefore depends upon an analysis of Cal/OSHA and California tort law. Since it is not intertwined or substantially dependent upon consideration of the terms of the labor contract, it is not preempted by section 301.
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> A-10.

Because petitioners' formulation and proposed resolution of the section 301 preemption issue badly misconstrues this Court's decisions[13] and because the Ninth Circuit has properly analyzed the issue, the petition for certiorari should be denied.

III

THE NINTH CIRCUIT PROPERLY HELD THAT RESPONDENTS' WRONGFUL DISCHARGE CLAIM IN VIOLATION OF PUBLIC POLICY IS NOT PREEMPTED UNDER THIS COURT'S *GARMON* DECISION

It should first be noted that the *Lingle* decision does not involve the issue of preemption under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Consequently, petitioners'

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[13] It should be noted that the Ninth Circuit's result is not only supported by *Allis-Chalmers* and *Metropolitan Life*, but by the cases cited in Section I, *supra*, which demonstrates Congress' intent to permit federal protective law systems to coexist with the NLRA/LMRA. *See, e.g., Barrentine v. Arkanas-Best Freight System*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonald v. City of West Branch*, 466 U.S. 384 (1984); *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, ___ U.S. ___, S.Ct. 1410 (1987).

arguments based on *Garmon* do not provide a reason to grant certiorari in this case and hold it in abeyance pending the decision in *Lingle*.

Nor is there any reason to grant certiorari to review the Ninth Circuit's finding that respondents' wrongful discharge claim based on Cal/OSHA is not preempted under *Garmon*. Congress' intent to permit state regulation of workplace safety applies with equal force to the preemption analysis under *Garmon* as it does to section 301 preemption. Thus, Congress' enactment of Fed/OSHA establishes that Congress did not intend to give the National Labor Relations Board ("NLRB" or "Board") exclusive jurisdiction to decide state law occupational safety claims in situations where employees act in concert to protest working conditions which violate state regulations.

Moreover, viewed from their effect on federal labor law, it is evident that minimum state occupational safety laws are a peripheral concern of the NLRA. Although Congress created a framework within which employees can bargain collectively with their employer, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 753; *New York Telephone v. New York Dept. of Labor*, 440 U.S. 529-530 (plurality opinion); *Machinist v. Wisconsin Employment Relations*, 427 U.S. 132 (1975), there is no evidence that Congress intended bargaining over minimum levels of health and safety to be part of this economic warfare. As stated by this Court in *Metropolitan Life*:

> Most significantly, there is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad of state laws then in existence that set minimum labor standards, but were unrelated in any way to the process of bargaining or self-organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety.
>
> 471 U.S. at 756.

Given Congress' intent that minimum state safety standards be left undisturbed by the federal collective bargaining scheme, it

follows that Congress did not intend to confer jurisdiction on the NLRB to resolve claims based on such state laws. The parties to a labor contract should not be permitted to frustrate Congress' intent in this regard by incorporating state occupational safety statutes into their collective bargaining agreement. This, however, would be the result if petitioners' position is accepted.

This Court's decision in *NLRB v. City Disposal System, Inc.*, 465 U.S. 822 (1984) does not support petitioners' argument. In *City Disposal*, the right not to drive unsafe trucks was a product of collective bargaining, not state law. Therefore, the driver was acting to protect rights created by and rooted in the labor contract. As *City Disposal* makes clear, such activity, if concerted, is protected by section 7 of the NLRA and subject to the jurisdiction of the Board. On the other hand, state laws, such as Cal/OSHA, that do not regulate the collective bargaining process itself, but instead provide minimum safety standards which serve as a backdrop for collective bargaining, are not preempted under the *Garmon* doctrine or any other preemption theory.

Since *Garmon* preemption is not applicable to Paige and Harris' claim for wrongful discharge in violation of public policy, there is no reason to grant certiorari to review the Ninth Circuit's decision in this regard.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: December 23, 1987

Respectfully Submitted,

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(3)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

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CHEVRON CHEMICAL COMPANY
and EUGENE GREEN,
Petitioners,

VS.

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Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

INTRODUCTION

Petitioners submit this reply brief, in accordance with Supreme Court Rule 22.5, to respond to the arguments first raised in the opposition brief filed by respondents Donald Paige and Andrew Harris.

Respondents argue that because the federal Occupational Safety and Health Act ("Fed/OSHA"), 29 U.S.C. §§ 651-678, allows states to adopt a health and safety scheme at least as rigorous as that required by Fed/OSHA, their state public policy wrongful discharge claim, which cites Cal/OSHA, and their working conditions claims are not pre-empted because they further the federal policy of worksite safety and therefore are not subject to the arbitration procedures of their collective-bargaining

agreement. In this respect, respondents contend, their case is distinguishable from the conflict within the Circuits motivating the Court to accept certiorari of *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, ____ U.S. ____, 108 S.Ct. 226 (1987). As discussed below, this argument is not supported by this Court's decisions.

Accompanying their argument that this case presents not a question of pre-emption but of "accommodation" between federal statutes is respondents' assertion that their state causes of action, because they are based on a public policy of workplace safety, displace arbitration as a favored remedy. This contention, too, is unavailing, as demonstrated by the Court's decision in *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974).

II

RESPONDENTS' ARGUMENT THAT THEIR STATE TORT CLAIMS ARE SAVED FROM PRE-EMPTION BECAUSE THEY FURTHER FEDERAL OSHA POLICY IS INCORRECT BECAUSE THE CLAIMS INVOKE POLICY, NOT SPECIFIC FEDERAL REMEDIES

Seeking to obscure their failure to exhaust the arbitration requirement of their labor contract or to avail themselves of the express make-whole remedies under either the federal or state OSHA statutes, respondents in their opposition brief attempt to sidestep the presumption of arbitrability by claiming that their state public policy-related tort claims actually assert rights guaranteed by Congress in the federal OSHA statute that displace the arbitration obligation honored by § 301 of the Labor-Management Relations Act ("LMRA"). Such a contention is flawed and does not provide a reason to deny certiorari in this case. State tort claims based on the "policy" underlying a federal statute, as opposed to claims invoking a specific federal statutory remedy, cannot be maintained by employees subject to an arbitration requirement.

It is true that despite the strong federal labor policy favoring arbitration of workplace disputes, this Court has permitted individual workers to maintain overlapping federal claims when

premised on *specific* federal statutory provisions creating federal remedies. *See, e.g., Atchison, Topeka and Santa Fe R. Co. v. Buell,* ____ U.S. ____, 107 S.Ct. 1410, 94 L.Ed. 2d 563, 573-74, 576 (1987) (personal injury action under Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, not precluded by grievance and arbitral remedies provided in collective-bargaining agreement governed by Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*); *McDonald v. West Branch,* 466 U.S. 284, 288-292 (1984) (civil rights action brought under 42 U.S.C. § 1983 not precluded by award in prior arbitration proceeding conducted pursuant to collective-bargaining agreement); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 734-45 (1981) (action for back wages under Fair Labor Standards Act, 29 U.S.C. §§ 201-219, not precluded by prior submission of claims to joint grievances committee or by National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169, and Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 171 *et seq.* (1982)); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 49-50, 59-60 (1974) (Title VII claim not precluded by grievance and arbitral remedies provided in collective bargaining agreement or by NLRA).

However, to prevent employees from circumventing arbitration simply by recharacterizing their state tort claims as implicating the policies or purposes underlying various federal statutes, federal courts applying this line of cases have limited this accommodation to actions brought under specific federal statutory sections. Consequently, courts have not permitted employees to litigate claims based on discharge or employment conditions in cases alleging, as in the instant case, violation of a *policy* underlying a federal statute. *E.g., Lewy v. Southern Pacific Transp. Co.,* 799 F.2d 1281, 1291-92 (9th Cir. 1986); *Lancaster v. Norfolk and Western Ry. Co.,* 773 F.2d 807, 813-14 (7th Cir. 1985); *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045, 1050-51 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007 (1984); *cf. Olguin v. Inspiration Consol. Copper Co.,* 740 F.2d 1468, 1475 (9th Cir. 1984).

In this case, respondents failed to invoke any specific federal statutory remedy and, to avoid pre-emption of their worksite dispute, attempt to bootstrap the OSHA policy onto their state common-law tort claims. Fed/OSHA prohibits employers from

discharging or discriminating against employees for exercising rights under the federal statute. 29 U.S.C. § 660(c). In respondents' words, the Fed/OSHA "scheme includes a prohibition on the retaliatory discharge of persons *who avail themselves* of the protections of Fed/OSHA." Resp. Br. at 6 (emphasis added). Respondents did not, however, "avail themselves" of the remedy provided in 29 U.S.C. § 660(c)(2). While the federal statute forbids retaliatory discharge, Fed/OSHA does not authorize a state common-law tort action to remedy the wrong. Section 660(c)(2) permits an aggrieved employee to file a complaint within 30 days of discharge with the Secretary of Labor; if after investigation a violation is found, the Secretary is authorized to bring an action in federal court on the employee's behalf. The district court is empowered with jurisdiction to restrain the violation and order reinstatement of the employee with back pay. Respondents never filed such a complaint with the Secretary of Labor. Nor did respondents even "avail themselves" of the Cal/OSHA remedy. Like Fed/OSHA, the California Occupational Safety and Health Act, Cal.Lab.Code § 6300 *et seq.*, which was approved by the Secretary of Labor, provides a reinstatement and back-pay remedy for complaints filed with the state enforcement division. Cal. Lab.Code § 6310. Moreover, § 6311 provides a state right of action for back wages if an employee is wrongfully discharged for refusing to work. The federally-approved state statutory scheme therefore does not provide an aggrieved employee with a right to assert common-law causes of action seeking tort and punitive damages. And no discriminatory discharge complaint or action for back wages ever was filed by respondents in accordance with the Cal/OSHA statute.

Contrary to the impression respondents attempt to create, this case does not present claims based on a specific federal statutory provision intended by Congress to create a federal cause of action. Respondents seek recovery based on state common-law remedies, and do not assert specific violations of, or invoke the remedies contained in, the provisions of the federal or California OSHA statutes. Respondents simply argue they can bypass binding arbitration of their workplace dispute, bypass the procedures of Fed/OSHA, and bypass the remedial provisions of Cal/OSHA, while still maintaining—in the name of public policy--common-

law tort claims that seek remedies not available at arbitration or under the federal or state safety statutes.

Consequently, there is no actual overlap in this case between respondents' discharge and working conditions claims and Fed/OSHA or Cal/OSHA. Because none of the common-law tort claims invokes remedies authorized under either statute, there is no "alteration" or disturbance of occupational safety laws.[1] Rather, the conflict is between state common-law claims arising out of a workplace dispute and the policy of § 301 of the LMRA to enforce agreements to arbitrate rather than litigate such disputes.[2] This is precisely the issue that led to the conflict-

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[1] An agreement to arbitrate safety disputes is not, as respondents suggest, contrary to federal or California law. *See* Resp. Br. at 10. Arbitration of worksite safety or safety-related discharge disputes does not alter federal or state safety standards or undermine the policies on which they are based. *See Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974) and *Paperworks v. Misco, Inc.*, 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987) (No. 86-651), discussed *infra* in Section III. Moreover, Cal.Lab.Code § 6310(b), one of the sections of Cal/OSHA forming the "public policy" component of respondents' state wrongful discharge claim, makes it a misdemeanor for an employer willfully to refuse:

> "to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for such rehiring or promotion by a *grievance procedure, arbitration,* or *hearing authorized by law.*" (Emphasis added.)

"Obviously," as a California appellate court has observed, "that sentence contemplates that a grievance or arbitral tribunal might properly order reinstatement of an employee dismissed in retaliation for conduct of the sort protected under section 6310. . . ." *Hentzel v. Singer Co.*, 188 Cal.Rptr. 159, 167 (Cal.App. 1982).

[2] Contrary to respondents' assertion that the Ninth Circuit "properly le[ft] to the state court the determination whether pre-emption is a defense to any of [the five remanded "working conditions"] claims," Opp. Br. at 9, if respondents' only rights arise under federal law, the state court is without jurisdiction and "the district court has no discretion to remand the [claims] to state court." *Price v. PSA, Inc.*, 829 F.2d 871, 874-75 (9th Cir. 1987). Under the circumstances presented here, the district court's order remanding the "pendent state claims" was not pursuant to 28 U.S.C. § 1447(c) and therefore is reviewable. *See Id.* at

ing interpretations in the Circuits identified in the petition and motivating this Court's grant of certiorari in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, ____ U.S. ____, 108 S.Ct. 226 (1987).

III

THE PRESUMPTION OF ARBITRABILITY APPLIES TO WORKPLACE SAFETY DISPUTES

This Court already has decided that workplace safety disputes are subject to arbitration if such disputes, as here, are encompassed by the parties' collective-bargaining agreement. In *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), the Court rejected the argument made by respondents in this case: that federal policy encouraging arbitration is inapplicable to workplace safety disputes. Observing that "industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects," the Court criticized the fear that an arbitrator "might be too grudging in his appreciation of the workers' interest" in their own safety:

> We see little justification for the court's assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust. We also disagree with the implicit assumption that the alterna-

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874; *Scott v. Machinists Automotive Trades Dist. Lodge No. 190*, 827 F.2d 589 (9th Cir. 1987); *Survival Sys. Div. of Whittaker Corp. v. District Court*, 825 F.2d 1416 (9th Cir. 1987); App. to Pet. for Cert. The Ninth Circuit below correctly held it *had* removal jurisdiction over all of respondents' claims based on the implied covenant wrongful discharge claim it found to arise under the collective-bargaining agreement. App. to Pet. for Cert. at A-7. As discussed in the petition, resolution of respondents' public policy wrongful discharge claim and the five remanded "working conditions" claims depends on analysis of the collective-bargaining agreement; the claims therefore arise under § 301 of the LMRA, leaving the state court without jurisdiction. The claims also involve arguably protected concerted activity subject to the exclusive jurisdiction of the National Labor Relations Board. Analyzed either way, the district court had no discretion to remand the pre-empted claims to a state court without jurisdiction.

> tive to arbitration holds greater promise for the protection of employees. Relegating safety disputes to the arena of economic combat offers no greater assurance that the ultimate resolution will ensure worker safety. Indeed, the safety of the workshop would then depend on the relative economic strength of the parties rather than an informed and impartial assessment of the facts.
>
> We therefore conclude that the "*presumption of arbitrability*" *announced in the Steelworkers Trilogy applies to safety disputes.* . . .

414 U.S. at 380 (emphasis added).

In concluding that safety disputes are subject to arbitration, this Court explicitly rejected the contention that federal safety statutes displace all agreements to arbitrate safety conditions, and concluded that a "fair reading of the Act discloses no congressional intention, either express or implied, to accomplish such a drastic result." 414 U.S. at 380 n.10. Federal Mine Safety and Health Act ("Fed/MSHA"), 30 U.S.C. §§ 801 *et seq.*

The policy concerns in the Fed MSHA—a safe and healthful workplace—are indistinguishable from those in OSHA. And each statute protects "the refusal to work in conditions which are believed to be unsafe or unhealthful." *Whirlpool Corporation v. Marshall,* 445 U.S. 1, 13 n.18 (1980); *compare* Fed/MSHA, 30 U.S.C. § 815(c)(1) with Fed/OSHA, 29 U.S.C. § 660(c)(1). The *Gateway Coal* decision supports the view that neither statute, however, precludes or supersedes arbitration of workplace safety disputes such as those at issue here.

This Court reaffirmed the strong federal policy favoring arbitration of workplace safety disputes last month in *Paperworkers v. Misco, Inc.,* 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987) (No. 86-651). In reversing the Fifth Circuit's decision to overturn an arbitration award on public policy grounds, the Court observed that the federal labor statutes reflect "a decided preference for private settlement of labor disputes without the intervention of government," noting that the "issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases." 56 U.S.L.W. at 4014, 4016 n.11.

Although it would seem to be clear that worksite disputes of the type disguised by respondents as common-law torts are subject to the same presumption of arbitrability and pre-emption analysis announced in this Court's prior decisions, the conflict among the Circuits, reflected by different outcomes in this case and in *Lingle,* calls for resolution by this Court of an issue vital to the interests of employees, unions and employers.

CONCLUSION

By seeking to apply a federal policy gloss to their state tort claims, respondents inadvertently highlight the need for this Court's guidance in resolving the conflict between upholding the paramount federal policy of resolving workplace disputes through arbitration and permitting unionized workers to bypass arbitration for a state court by asserting "public policy" claims. Public policy wrongful discharge claims originally were created by states to protect non-unionized workers. The fact that such policy-based claims vary from state-to-state threatens the efficacy of arbitration and the interpretive uniformity of federal labor law as tools to promote industrial self-government. This case not only presents the same issue as this Court accepted in *Lingle,* but adds a full range of discharge-related claims stemming from worksite disputes. It also raises an important issue of *Garmon* pre-emption because of the Ninth Circuit's decision allowing employees to circumvent the NLRB's exclusive jurisdiction simply by casting an unfair labor practice claim as state law torts. Accordingly, certiorari should be granted.

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Respectfully submitted,

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